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LDRC Study #6

SUMMARY JUDGMENT MOTIONS IN LIBEL ACTIONS: (TWO - YEAR UPDATE) (1982-1984)

LDRC's new Study of summary judgment motions in libel cases during the period 1982-1984 is a follow-up to its earlier Study of summary judgment motions which covered the period 1980-1982. (See LDRC Bulletin No. 4, Part 2 at 2-35). The current Study of 136 summary judgment motions involving media defendants, when combined with LDRC's earlier Study of 110 motions, has enabled LDRC to examine the results of almost 250 motions covering the four years since Hutchinson v. Proxmire cast some doubt on the availabilty of summary judgment, at least in certain important media libel actions.

The new LDRC Study confirms the results of the earlier Study. It documents that summary judgment continues to be the rule rather than the exception in libel litigation. Based upon this additional LDRC data, the hypothesis that Hutchinson might significantly reduce defendants' success in securing summary relief must therefore continue to be questioned, at least as a statistical matter.

Summary of Findings

1. Overall, the LDRC data reveals that defendants' summary judgment motions prevailed in just under 74% of the cases studied during the 1982-84 period. This success rate is down only slightly from the 75% shown in LDRC's 1980-1982 Study.

2. At the trial court level there has also been no significant change in the success rate of summary judgment. The current Study reveals that defendants have been granted summary judgment in 80% of the cases at the trial level up fractionally from the earlier Study which showed a success rate of 79%.

3. On appeal, the success rate of summary judgment is down, but only by 4%, from the 70% success rate of the earlier period. Still, substantially more than 6 out of 10 defendants' summary judgments are granted after appeals have been completed.

4. Moreover, if those cases where summary judgment was granted as to some issues or some media defendants were considered, defendants' success rate, at least as to such partial grants of summary judgment, increases to 82% of the motions made.

5. With regard to legal standard applied, the majority of courts continue to adopt a "neutral" standard for deciding summary judgment motions in media libel cases, neither favoring nor disfavoring these motions.

6. Although Hutchinson specifically questioned the availability of summary judgment when actual malice is at issue, 71% of defendants' summary judgment motions still prevail when the dispositive issue is actual malice, although this figure is down from the unusually high 83% rate found in the earlier Study.

7. Relatedly, when motions for summary judgment are made in cases involving public official or public figure plaintiffs, they were granted in 80% of the cases, up from 74% in the earlier Study. Summary judgments in private figure cases were down, however, to 65% from 75%.

8. With regard to the specific precedential effect of Hutchinson, Federal courts cited Hutchinson in only 6% of the cases in the current Study, while state courts cited Hutchinson in only 7% of the cases. Thus, the frequency with which Hutchinson was cited by both federal and state judges has in fact decreased substantially since the 1980-1982 Study where federal judges were citing Hutchinson in 30%, and state judges in 12%, of their summary judgment rulings.

9. Although the success rate in federal cases is down by 9% from the high 81% figure found in the earlier Study, defendants are continuing to obtain summary judgment in more than seven of ten federal cases. State cases show defendants prevailing in almost 75% of their motions, a slight increase since the period covered by the previous Study (73%).

10. Dispositive legal issues with high success rates on media defense motions for summary judgment included: opinion (85% success rate); privacy (80%); group libel (100%); statute of limitations (100%); gross irresponsibility (80%); truth/substantial truth (100%); neutral reportage (100%); fair report privilege (93%). Dispositive issues with lower success rates are: qualified privilege (67%); defamatory meaning (65%). And significantly, there were no grants of defendants' motions for summary judgment when the dispositive issue was negligence, although that issue was dispositive in only a very small number of cases.

11. Finally, rates of success on summary judgment also varied substantially by jurisdiction. For example, federal circuits with high defendant success rates included: First Circuit (100%); Fourth Circuit (80%); Fifth Circuit (100%); Seventh Circuit (100%); Ninth CIrcuit (80%); Tenth Circuit (100%); and Eleventh Circuit (80%). Circuits with lower success rates included: Second Circuit (67%); Third Circuit (67%); Sixth Circuit (33%); Eighth Circuit (67%) and D.C. Circuit (50%).

12. Among the states, rates of success also varied depending on the jurisdiction. For example, states showing notably high summary judgment rates involving a meaningful number of motions included: Florida (91%) and Michigan (83%) and, on the low side: New York (55%); Georgia (50%) and Hawaii (25%). In as many as 18 states, success rates were 100%, but based only on 1, 2 or 3 motions. On the other hand, in only 4 states with reported motions were no summary judgments granted, but in each of those jurisdictions only 1 motion was reported during the Study period.

Background of the LDRC Summary Judgment Studies

The background of LDRC's initial 1982 Study of motions for summary judgment in libel actions is set forth more fully in LDRC Bulletin No. 4 (Part 2) at 3-4. Essentially, LDRC sought to assess empirically whether dictum in footnote 9 of Hutchinson v. Proxmire, 443 U.S. 111, 120 (1979), which questioned the appropriateness of summary judgment in certain libel cases involving "actual malice", had adversely affected the availability of summary judgment. Until that time there had been a growing trend to grant summary judgment in media libel actions, often on the theory that First Amendment considerations mandated liberal grants in order to avoid the chilling effects of extended libel litigation.

In its initial Study LDRC found that Hutchinson did not appear to have greatly reduced the frequency of summary judgment in these cases at least in the first two years after footnote 9 when compared to available data from the period prior to Hutchinson. While Hutchinson appeared to have led some courts to eschew a "special" First Amendment rule for summary judgment, overall defendants' summary judgment motions nonetheless prevailed in 3 out of every 4 cases, only slightly down from the previous 4-year period. LDRC's conclusion, as a result of its initial Study, was that summary judgment, at least as of 1982, was still "the rule rather than the exception" in libel litigation.

In 1984, LDRC sought to assess whether the situation had changed between 1982 and 1984. Of particular concern was the possibility that the effects of footnote 9 had not been fully felt in the relatively brief (at least from a litigation point of view) two-year period post-Hutchinson. Moreover, in 1984 the Supreme Court "elevated" footnote 9 to the text, as it were, repeating in Calder v. Jones, 104 Sup.Ct. 1482, 10 Med.L.Rptr. 1401, 1405 its impliction in Hutchinson that no special rules should be applied to summary judgment motions in libel actions -- at least those involving the issue of "actual malice." In a unanimous opinion, Justice Rehnquist reiterated this view in his rejection of "the suggestion that First Amendment concerns" should affect "procedural" considerations (such as jurisdiction, discovery and summary judgment) in media libel actions.*

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* Justice Rehnquist's observations on this point are worth quoting in their entirety: "[T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. [Citing Sullivan and Gertz.] To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, e.g., Herbert v. Lando, 441 U.S. 153 (no First Amendment privilege bars inquiry into editorial process). See also Hutchinson v. Proxmire , 443 U.S. 111, 120 n.9 (implying that no special rules apply for summary judgment"). 10 Med.L.Rptr. at 1405.

Finally, by 1984 there was also a growing perception among media attorneys, despite LDRC's empirical findings on summary judgment, that as a practical matter, at least on a case by case basis, summary judgment appeared to be more difficult to obtain. More and more important cases, that once would almost certainly have been dismissed on summary judgment, were now surviving the pretrial process and were being allowed to go to trial. The Sharon and Westmoreland trials are two cases in point.

The Current Study

As a result of all these considerations, and in order to continue its effort to monitor all significant phases of libel litigation, LDRC undertook to study an additional two years of summary judgment decisions beginning where the first LDRC Study ended, on August 24, 1982, and continuing through August 21, 1984. All summary judgment decisions reported in the Media Law Reporter during this time period were included along with the results of certain unreported decisions during the same period available in LDRC's case files. The results of this new LDRC Study, of 136 media libel actions, are reflected in the tables and summary judgment case list which appear at the end of this report. The major findings are summarized above. Additional comments on these findings follow.

Four Years of Summary Judgment in Media Libel Actions since Hutchinson Compared to Four Years of Summary Judgment Prior to Hutchinson

As a result of the latest LDRC Study there is now available relatively complete and authoritative data on the results of summary judgment motions in libel actions over a period of 8 years, 4 years before and 4 years after Hutchinson v. Proxmire. The Franklin Study, supra, provides data pertaining to the 1976-1980 period prior to Hutchinson. The two LDRC Studies now provide data regarding the results of summary judgment motions for the four-year period subsequent to Hutchinson. Overall, in the four years post-Hutchinson, defendants' summary judgment motions have prevailed in 74% of the cases in which such motions were made. This is only slightly lower than the 78-80% record of success in the Franklin Study. The success rate of summary judgment after appeal is down from the 78% success rate found in the period prior to Hutchinson, but is still close to 7 out of 10 cases for the four years since Hutchinson. Considering how rare it is to secure summary judgment -- and to sustain those judgments on appeal -- in many other categories of civil actions, this record of success on summary judgment in the media libel field remains notable indeed.

Assessing the LDRC Findings

(i) Actual Malice

Considering the general difficuty in any civil action of securing summary judgment when subjective state of mind is in controversy, the frequency of summary judgment in libel actions where the dispositive issue is actual malice continues to be notable. Despite the decrease in frequency of such grants from 83% to 71%, between the first and second LDRC Studies, the issue of actual malice continues to be a major factor leading to the grant of summary judgment in media libel actions. Overall, in the four years covered, actual malice was the dispositive issue in almost half (114/246) of the summary judgment motions studied. Of those cases, in fully 78% the actual malice ruling lead to the grant of summary judgment. While these trends thus continue to be generally favorable, there is one factor that suggests the need for future considertion. That is, it does appear that the relative number of cases in which actual malice was asserted and seen as the dispositive issue is down, perhaps significantly. Thus, in LDRC's first Study, actual malice was dispositive in fully 60% of the motions studied; in the new Study, it was dispositive in only 35% of the cases. The judgmental nature of the dispositive characterization and the difficulty of comparing one data sample with another, makes it impossible to assess with certainty whether this seemingly significant statistical shift reflects a disinclination by attorneys to seek summary judgment on the actual malice issue, or a substantive refusal by the courts to grant summary judgment on that basis, or merely an insignificant coincidence resulting from the facts and circumstances of the particular cases that happened to be studied.

(ii) "Clear and Convincing" Evidence

As was noted in the previous LDRC Study, in many cases, after discovery, the record is simply devoid of facts or evidence suggesting the existence of actual malice, where that is the dispositive issue on the motion for summary judgment. In those situations it is clear that under even the most grudging standard, the grant of summary judgment is required. As in the previous Study, in many other cases the additional constitutionally-based requirement that actual malice must be established by "clear and convincing" evidence, or with "convincing clarity," continues to play a significant role in the grant of summary judgment in such cases. Thus, in as many as 28 of the cases studied, that high quantum of evidence was expressly noted and relied upon in connection with the grant of summary judgment. In only a small handful of cases (5/28) did the count discuss the "clear and convincing" standard, but yet not grant the motion.

(iii) Public Plaintiff vs. Private Plaintiff Actions

The success rate of summary judgment in public figure and official actions is up (from 74% to 80%) and it has overtaken the rate in private figure cases which is down (from 75% to 65%). In a sense, given the distinctions drawn by the Supreme Court between the two types of actions, this is quite expectable. The burden is high in public figure cases and a motion for summary judgment is therefore more difficult to defend. On the other hand, the lower burdens on private figures make the difficulties of securing summary judgment that much greater. This is particularly true when the issue is minimal fault under Gertz, primarily negligence. Again this time, LDRC's Study documents how negligence provides little protection for the media defendant, and certainly not at the summary judgment stage. Thus, in only 3 of the 136 cases studied was the issue of negligence dispositive on the motion for summary judgment. In all 3 of those cases, the motion was denied. This compares to a 33% success rate (2 "wins" out of 6 motions) on the negligence issue in the earlier Study. Nonetheless, summary judgment continues to be granted with some frequency in private figure cases, for the most part on the basis of common law privileges, truth, lack of defamatory meaning, constitutional protections for opinion and other procedural devices.

(iv) Federal vs. State Cases

Although this Study shows that the success rate of summary judgment motions in federal cases is down by 9% from the 1980-82 Study, the success rate remains high and federal judges are still granting summary judgments in more than seven out of ten cases where the motion is made. In state cases, defendants' motions for summary judgment are granted in 74% of the cases, a slight increase, in fact, over the 73% rate experienced during the earlier 2-year period. The infrequency with which Hutchinson is cited in both federal and state cases is another indication that the impact of Hutchinson has not been as great as previously feared. Hutchinson was only cited 3 times in a total of 50 federal cases -- a rate of citation five times less frequent than in the earlier period. State judges are also citing Hutchinson less frequently than in the prior Study. Finally, in Tables 7 and 8 we have attempted to chart the relative frequency of grants and denials of summary judgment in the various states and federal circuits. While there is some apparent correlation in certain cases between known attitudes toward libel issues in particular jurisdictions, in most cases the number of motions are far too small to judge summary judgment trends in the states and circuits with any degree of confidence.

Future Prospects for Summary Judgment -- Implications of the LDRC Data

The basic findings of the new LDRC Summary Judgment Study would appear to bode well for the future, at least as a statistical matter. Summary judgment contines to be granted in almost 3 out of 4 cases, and remains the rule rather than the exception in libel litigation. Indeed, there is every reason to believe that the numerous defenses and privileges granted to libel defendants under common and constitutional law will continue to result in a future record of success on summary judgment far superior than that experienced in most other areas of civil litigation. Certainly, it will behoove libel defense counsel to press for summary judgment in appropriate cases in the future, as in the past, both to reduce the burdens and costs of libel litigation as well as to avoid trials where the media's record of success, however much it has improved, remains far poorer than at the summary judgment stage.

But the numbers that LDRC has developed, however important, are not necessarily the entire story. They should not obscure the fact that in far too many cases summary judgment is still not granted. These actions must therefore go through a costly and burdensome trial process although more than 80% of the claims that are tried are ultimately found to be without merit. Also, although many summary judgment motions are still being made, it is impossible precisely to assess the frequency of such motions. It is possible that, relatively speaking, fewer summary judgment motions are being made, resulting in a relatively greater number of libel trials. Relatedly, it is also possible that more discovery is being required, and thus that greater time and experience are expended, before courts will give summary judgment motions serious consideration. Finally, and again despite the excellent overall numbers, it is difficult to avoid the conclusion that at least in particular instances, on a case by case basis, there are certain recent cases that have gone to trial, summary judgment having been denied, that one feels would almost surely have been dismissed on summary judgment in the past. For whatever reason, whether due to Hutchinson or many other subtle factors, the unavoidable impression is that too many courts, which once would almost certainly have emphasized First Amendment principles in considering -- and granting -- summary judgment are now reaching out for new ways to interpret both procedural and substantive standards so as to preclude the grant of summary judgment in media libel actions.

What can be done to hold the line, if not to improve the media's record on summary judgment, is not entirely clear in light of the subtle but potentially adverse shift of judicial emphasis we may now be experiencing -- an ambivalence that is reflective of, if not indeed the result of, conflicting trends at the Supreme Court level. On the one hand, the Supreme Court has developed and recently reaffirmed strong substantive protections for the media. As is shown by LDRC's studies, in most cases, these substantive standards themselves compel the grant of summary judgment even when the question is judged by normal standards without application of special rules to protect First Amendment rights. Thus, even if one accepts Justice Rehnquist's aversion to "double counting" on the procedural side of these issues, the substantive standards should still compel a favorable result in the great majority of cases. As a result, it will continue to be important for media defense counsel to focus lower courts, in their consideration of summary judgment, on the substantive mandate of Sullivan and Bose, rather than on the procedural cautions of Hutchinson and Calder. Counsel can appropriately ask why it is either necessary or appropriate for the courts to refuse to look searchingly into the preliminary merits of fact and law in libel actions on summary judgment, as might be suggested by Hutchinson or Calder, when it is constitutionally required by both Sullivan and Bose that they do so, after the additional severe burden and expense of trial, on appeal. It is to be hoped, in sum, that the illogic of these procedural constraints will be overwhelmed by the force and merit of the substantive protections that flow in these cases from the very core of the First Amendment.

LDRC Summary Judgment Data

The Summary Judgment case list at the end of this Study contains data regarding 136 libel cases. These represent all summary judgment cases reported in Volume 8 of the Media Law Reporter after August 24, 1982, all of Volume 9 of the Media Law Reporter and Volume 10 through August 21, 1984. The list also includes data from a small number of cases which were culled from the Libel Defense Resource Center case files containing cases obtained by LDRC from media counsel and advance opinions obtained from BNA, but not (yet) reported in the Media Law Reporter.

The cases studied are arranged alphabetically and cite to Media Law Reporter; citations to other reporters are provided when available. Unreported cases are identified by docket number, jurisdiction and filing date. In all of the listed cases defendants moved for summary judgment and the results are given in the "rulings" column. Notation is made where partial summary judgment motions were filed or where partial rulings were made. The rulings column also informs the reader whether the rulings were issued by original jurisdiction or by appellate courts affirming or reversing previous rulings of lower courts. The third column gives the basis for the court denying defendant's summary judgment motions. The fourth column lists the issue on which the court seemed to base its summary judgment ruling. Cases frequently presented more than one issue for the court to determine. Although the characterizations of the dispositive issue is therefore somewhat judgmental, LDRC believes it to be generally accurate and useful for the purposes of this Study. Cases in which actual malice was the dispositive issue and the plaintiff was a public official or figure are appropriately labeled in order to highlight the cases presenting the precise summary judgment posture referred to in Hutchinson footnote 9. Column 5 notes those cases which have cited Hutchinson and the page on which the cites can be found. The standard of summary judgment used by the judge, where that standard was articulated or otherwise discernable, can be found in column 6. Although classificiation of summary judgment varies, for the purposes of this Study, cases in which the judge used a "neutral" standard included those which adhered to the standards of Federal Rule 56. Those cases which favored summary judgment and those which showed no clear delineation of the standard are appropriately labeled. Comments about other issues present in the case, the court's attitude toward summary judgment, and plaintiff's burden of proving actual malice are included in the seventh column. The last column provides information concerning the status of the case, when available.

Table 1

Overall Results of Summary Judgment Motions
(Trial or Appellate Level)*

Total Defendant Wins**

LDRC Study #6 (1982-84)	LDRC Study #2 (1980-82)	LDRC 4-Year Average (1980-84)	Franklin Data
Overall Data 100/136 (74%)	Overall Data 82/110 (75%)	182/246 (74%)	Trial 81/101 (80%) Appellate 73/94 (78%)

Total Plaintiff Wins***

(1982-84)	(1980-82)	1980-84 (Aug.)	Franklin Data
36/136 (26%)	28/110 (25%)	64/246 (26%)	Trial 20/101 (20%) Appellate 21/94 (22%)

* The LDRC overall data includes the latest disposition of summary judgment studied either at the trial or appellate level.

** To remain consistent with LDRC's previous study, cases are considered defendant wins (1) where summary judgment was granted to the media defendants but denied to non-media defendants; (2) where summary judgment was granted to the publisher but denied to author and; (3) where defendant only requested summary judgment on a certain issue and it was granted.

*** Again for the purpose of consistency, cases were characterized as plaintiff wins where the summary judgment motion was granted (1) as to some media defendants but not the publisher and; (2) as to some but not all issues. For example, Mehau v. Gannett, where summary judgment was granted to five media defendants but denied to U.P.I., was considered a plaintiff win.

Table 2

Trial Court
Dispostion of Motions for Summary Judgment*

Defendant's Summary Judgment Motion

Granted

(1982-84)	(1980-82)	(1980-1984 average)
15/74 (80%)	42/53 (79%)	101/127 (80%)

Denied

(1982-84)	(1980-82)	(1980-1984 average)
15/74 (20%)	11/53 (21%)	26/127 (20%)

* Comprises those 74 cases in which summary judgment motions were decided at the trial court level but which were either not appealed, or in which appeals have not yet been decided. For the results of the 62 motions which have been decided on appeal see Table 3-A below.

Table 3-A

Appellate Dispositions of Trial Court Rulings on Defendant's Motions for Summary Judgment*

	1982-1984 Data		1980-1982 Data	
Appellate Dispostion	Of 50 Summary Judgment Motions Granted by Trial Court	Of 12 Summary Motions Denied by Trial Court	Of 45 Summary Judgment Judgment Motions Granted by Trial Court	Of 12 Summary Judgment Motions Denied by Trial Court
Affirmed	34	5	36	8
Reversed and Remanded	12	0	8	0
Reversed and Dismissed	4	7	1	4

* Comprises those 62 of the total 136 Summary judgment motions in which appellate rulings have been issued regarding the grant or denial of defendant's motion for summary judgment.

Table 3-B

Overall Results of Summary Judgment
Motions after Appellate Review

Defendant's Motion Prevails After Appeal*

1982-84	1980-82	LDRC 4-Year Average	Franklin Data
41/62 (66%)	40/57 (70%)	81/119 (68%)	73/94 (78%)

Defendant's Motion Rejected After Appeal**

21/62 (34%)	17/57 (30%)	38/119(32%)	21/94 (22%)

* Defendant "prevails" on appeal in cases where trial court grants are affirmed or trial court denials are reversed.

** Defendant's motion is "rejected" where trial court denials are affirmed or trial court grants are reversed.

Table 4

Issues Found Dispositive on Motions for Summary Judgment

Issues	Defendant's Motion Prevails	Defendant's Motion Rejected
Actual Malice	34 (71%)	14 (29%)
Opinion	11 (85%)	2 (15%)
Privacy	8 (80%)	2 (20%)
Negligence	0 (0%)	3 ((100%)
Group Libel	1 ((100%)	0 (0%)
Statute of Limitations	5 (100%)	0 (100%)
Gross Irresponsibility	4 (80%)	1 (20%)
Truth/Substantial Truth	9 (100%)	0 (0%)
Determination of Public Figure Status	0 (0%)	3 (100%)
Neutral Reportage	2 (100%)	0 (0%)
Qualified Privilege	2 (67%)	1 (33%)
Defamatory Meaning	11 (65%)	6 (35%)
Fair Report Privilege	13 (93%)	1 (7%)
Republication	0 (0%)	2 (100%)
Survivability of Libel Claim After Plaintiff's Death	0 (0%)	1 (100%)

Table 5-A

Results of Summary Judgment Motions Involving Public Official/Figure Plaintiffs

Plaintiff's Motion for Summary Judgment Prevails		Plaintiff's Motion for Summary Judgment Rejected	
Granted	34	Denied	7
Affirmed Grant	17	Affirmed Denial	2
Reversed Denial	2	Reversed Grant	4
	53 (80%)		13 (20%)

Total Cases 66/123*

Table 5-B

Results of Summary Judgment Motions Involving non-Public-Figure/Official Plaintiffs

Granted	23	Denied	6
Affirmed Grant	10	Affirmed Denial	2
Reversed Denial	4	Reversed Grant	12
	37 (65%)		20 (35%)

Total cases 57/123*

* There were 13 cases where the public figure status of plaintiff was not clear.

Table 6

Comparison of Results of Summary Judgment Motions in Federal vs. State Cases

Federal - 50 cases total

	Defendant's Motion Prevails	Defendant's Motion Rejected
1982-1984	36/50 (72%)	14//50 (28%)
1980-1982	26/32 (81%)	7/32 (19%)
1980-84 average	62/82 (75%)	21/82 (25%)

State - 86 cases total

1982-84	64/86 (74%)	22/86 (26%)
1980-82	56/77 (73%)	21/77 (27%)
1980-84 average	120/163 (74%)	43/163 (26%)

Table 7

Summary Judgment Motions in Federal Cases Broken Down by Circuit

	Defendant's Motion Prevails	Defendant's Motion Rejected
First Circuit	1 (100%)	0 (0%)
Second Circuit	4 (67%)	2 (33%)
Third Circuit	6 (67%)	3 (33%)
Fourth Circuit	4 (80%)	1 20%)
Fifth Circuit	1 (100%)	0 (0%)
Sixth Circuit	1 (33%)	2 (67%)
Seventh Circuit	3 (100%)	0 (0%)
Eighth Circuit	2 (67%)	1 (33%)
Ninth Circuit	4 (80%)	1 (20%)
Tenth Circuit	3 (100%)	0 (0%)
Eleventh Circuit	4 (80%)	1 (20%)
D.C. Circuit	3 (50%)	3 (50%)

Table 8

Summary Judgment in State Cases
Broken Down by State

	Defendant's Motion Prevails	Defendant's Motion Rejected
Alaska	0 (0%)	1 (100%)
California	2 (100%)	0 (100%)
Colorado	3 (100%)	0 (100%)
Connecticut	1 (100%)	0 (100%)
District of Columbia	1 (100%)	0 (100%)
Florida	10 (91%)	1 (9%)
Georgia	2 (50%)	2 (50%)
Hawaii	1 (25%0	3 (75%)
Illinois	1 (100%)	0 (0%)
Kansas	0 (0%)	1 (100%)
Kentucky	2 (100%)	0 (0%)
Louisiana	2 (100%)	0 (100%)
Maine	2 (100%)	0 (0%)
Maryland	4 (100%)	0 (0%)
Massachusetts	3 (100%)	0 (0%)
Michigan	5 (83%)	1 (17%)
New Hampshire	1 (50%)	1 (50%)
New Jersey	2 (100%)	0 (0%)
New Mexico	0 (0%)	1 (100%)
New York	6 (55%)	5 (45%)
North Carolina	0 (0%)	1 (100%)
Ohio	3 (100%)	0 (0%)
Oklahoma	2 (100%)	0 (0%)
Oregon	2 (67%)	1 (33%)
Pennsylvania	1 (50%)	1 (50%)
Tennessee	1 (100%)	0 (0%)
Texas	1 (100%)	0 (0%)
Virginia	1 (100%)	0 (0%)
Washington	3 (100%)	0 (0%)
West Virginia	1 (50%)	1 (50%)
Wisconsin	1 (33%)	2 (67%)

NAME OF CASE (and citation)	RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	BASIS FOR DENIAL	DISPOSITIVE ISSUE/DEFENSE	HUTCHINSON V. PROXMIRE 443 U.S. 111, 120 n.9 (1979)	SUMMARY JUDGMENT STANDARD EMPLOYED	OTHER MATTERS	CASE STATUS
Andren v. Knight-Ridder Newspapers, 10 Med.L.Rptr. 2109 (E. D. Mich. 1984)	Granted	---	Privacy/ Newsworthiness	Not cited	Favored/First Amendment	---	Media defendants dismissed from case
Bair v. Palm Beach Newspapers, 10 Med.L.Rptr. 1624 (Fla. Dist. Ct. App. 1984)	Affirmed grant	---	Qualified privilege	Not cited	Not clear	Substantial truth; Neutral reportage	---
Bank of Oregon v. Independent News, 670 P.2d 616, 9 Med.L.Rptr. 2425 (Ore. Ct. App. 1983)	Reversed grant	Genuine issue of material fact	Negligence	Not cited	Neutral	Negligence standard provides adequate protection for media in coverage of private individuals	Reversed & Remanded
Barry v. Time, 10 Med.L.Rptr. 1809 (N.D. Cal. 1984)	Granted	---	Neutral Reportage	Not cited	Favored/First Amendment	Neutral reportage prevents chilling effect on publication of newsworthy but defamatory information	---
Beamer v. Nishiki, 10 Med.L.Rptr. 1171 (Hi 1983)	Affirmed denial	Genuine issues of material fact	Actual malice (public figure)	Cited at 1175	Not clear	Reasonable trier of fact could find actual malice with convincing clarity	Remanded for new trial
Bell v. Associated Press, 10 Med.L.Rptr. 1489 (D.D.C. 1984)	Granted	---	Fair Report Privilege	Not cited	Not clear	Requiring A.P. to investigate official reports is inconsistent with First Amendment values	---
Bichler v. Union Bank, 715 F.2d. 1059, 9 Med.L.Rptr. 1033 (6th Cir. 1983)	Reversed grant	Plaintiff not required to show actual malice	Qualified privilege	Not cited	Not clear	Qualified privilege does not apply when plaintiff is only tenuously connected to the public issue	Reversed & Remanded
Bisbee v. Conover, Med.L.Rptr. 1298 (N.J. Super. Ct. 1982)	Affirmed grant	---	Privacy	Not cited	Neutral	Information revealed was public knowledge, true and not offensive	---

NAME OF CASE (and citation)	RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	BASIS FOR DENIAL	DISPOSITIVE ISSUE/DEFENSE	HUTCHINSON V. PROXMIRE 443 U.S. 111, 120 n.9 (1979)	SUMMARY JUDGMENT STANDARD EMPLOYED	OTHER MATTERS	CASE STATUS
Braig v. Field Communications, 9 Med.L.Rptr. 1057 (Pa. Super. Ct. 1983)	Reversed grant	Genuine issue of fact	Actual malice (public official)	Cited at 1065	Disfavored	Hutchinson followed; jury should decide defendant's "state of mind"	Reversed & Remanded
Brennan v. Globe Newspaper Co., 9 Med.L.Rptr. 1147 (Mass. Super. Ct. 1982)	Granted	---	Truth	Not cited	Not clear	Plaintiff has no privacy claim because information was a matter of public record	---
Brooks v. Stone, 10 Med.L.Rptr. 1517 (Ga. Ct. App. 1984)	Reversed grant	Genuine issue of fact	Defamatory meaning	Not cited	Neutral	---	---
Brown v. Herald Co., Inc., 698 F. 2d. 949, 9 Med.L.Rptr. 1149 (8th Cir. 1983)	Affirmed grant	---	Actual malice (public figure)	Not cited	Neutral	Plaintiff must prove actual malice with convincing clarity; Nothing in record to allow court to find actual malice	---
Bowes v. Wisconsin Vocational Board, 9 Med.L.Rptr. 2372 (Wisc. Cir. Ct. 1983)	Granted	---	Actual malice (public official)	Not cited	Not clear	Plaintiffs fail to introduce facts raising even an inference of actual malice	---
Bufalino v. A.P., 8 Med.L.Rptr. 2384 (2nd Cir. 1982)	Reversed grant	Defendant's must identify sources to invoke Fair Report Privilege	Fair Report Privilege	Not cited	Not clear	---	Reversed & Remanded
Baron v. Bangor Publishing Co., 10 Med.L.Rptr. 1365 (Me. 1984)	Affirmed grant	---	Opinion	Not cited	Neutral	---	---
Tinker, Inc., v. Northern Gas Co., Inc., 10 Med.L.Rptr. 1427 (D. Wy. 1984)	Granted	---	Truth	Not cited	Neutral	Court recognizes advantages of summary judgment in libel actions but favors neither grant nor denial of summary judgment	Dismissed with prejudice

AME OF CASE and citation)	RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	BASIS FOR DENIAL	DISPOSITIVE ISSUE/DEFENSE	HUTCHINSON V. PROXMIRE 443 U.S. 111, 120 n.9 (1979)	SUMMARY JUDGMENT STANDARD EMPLOYED	OTHER MATTERS	CASE STATUS
Clark v. ABC, 684 F.2d 1208, 8 Med.L.Rptr. 2049 (6th Cir. 1982)	Reversed grant	Genuine issue of fact	Defamatory meaning	Not cited	Neutral	No rule favoring grant or denial of summary judgment motions in defamation cases	Reversed & Remanded
Cochran v. Piedmont Publishing, 302 S.E.2d 903, 9 Med.L.Rptr. 1919 (N.C. Ct. App. 1983)	Reversed grant	Genuine issue of material fact	Actual malice (public figure)	Not cited	Disfavored	Reversed grant of partial summary judgment on plaintiff's claim for punitive damages	---
Coronodo Credit Union v. Koat, 9 Med.L.Rptr. 1031 (N.M. Ct. App. 1982)	Affirmed grant in part, reversed in part	Genuine issue of material fact	Opinion	Not cited	Neutral	2 statements found to be opinion; 1 statement raises issue of fact as to truth	---
Crossman v. Brick Tavern, 9 Med.L.Rptr. 1403 (Wash. Ct. App. 1982)	Affirmed grant	---	Defamatory meaning	Not cited	Not clear	---	---
Crump v. Beckley Newspapers, Inc., 10 Med.L.Rptr. 2225 (W. Va. 1983)	Reversed grant	Genuine issue of material fact	Privacy/ False Liget	Not cited	Neutral	Jury should decide in what light communication places plaintiff	Reversed & Remanded
Curtis v. Evening News Assoc., 10 Med.L.Rptr. 1857 (Mich. Ct. App. 1984)	Reversed denial	---	Defamatory meaning	Not cited	Neutral	Indirect damage to a plaintiff's reputation resulting from defamation of a deceased relative is not actionable	---
D'Alfonso v. A.S. Abell Co., 10 Med.L.Rptr. 1663 (D. Md. 1984)	Granted	---	Fair Report Privilege	Not cited	Neutral	Qualified privilege protects fair and accurate reports of official transaction	---

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Dameron v. Washingtonian, 10 Med.L.Rptr. 1220 (D.D.C. 1983)	Granted	---	Fair Report Privilege	Not cited	Favored/First Amendment	Summary judgment appropriate in defamation actions in order not to chill First Amendment freedoms	---
Dannis v. Panax Newspapers, 9 Med.L.Rptr. 1446 (Mich. Cir. Ct. 1982)	Granted	---	Truth	Not cited	Neutral	---	---
Davis v. Costa-Gravas, 10 Med.L.Rptr. 1257 (S.D.N.Y. 1984)	Granted	---	Statute of limitations	Not cited	Neutral	Defendants were not responsible for republication	---
Della-Donna v. Gore Newspapers, 10 Med.L.Rptr. 1526 (Fla. Cir. Ct. 1983)	Granted	---	Actual malice (public figure)	Not cited	Favored/First Amendment	Extensive discovery has failed to demonstrate actual malice with convincing clarity	---
Dietz v. Matturro, 8 Med.L.Rptr. 2199 (N.Y. Sup. Ct. 1982)	Granted	---	Actual malice (public figure)	Not cited	Neutral	Under Gertz private plaintiff must prove actual malice to recover upon a presumption of a damaged reputation; no support for claim of actual malice	Complaint dismissed
Dowd v. Calabrese, 10 Med.L.Rptr. 2017 (D.D.C. 1984)	Granted in part, denied in part	Genuine issue of material fact	Republication	Not cited	---	Consolidated actions; no actual malice; Fair Report	Defendant settled out of court
Duchesnaye v. Munro Enters., Inc., No.82-520 (N.H., filed 8/26/84)	Granted in part, denied in part	---	Defamatory meaning	Not cited	---	Summary Judgment granted with respect to news story; verdict for plaintiff with respect to editorial	---
Duncan v. WJLA-TV, 10 Med.L.Rptr. 1395 (D.D.C. 1984)	Granted in part, Denied in part	Material issue of fact	Defamatory meaning	Not cited	Neutral	Granted as to one broadcast, denied as to the other	---

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Eastern Milk Products v. Milkweed, 8 Med.L.Rptr. 2100 (N.D.N.Y. 1982)	Granted	---	Fair Report Privilege	Not cited	Not clear	---	Complaint dismissed
El Amin v. Miami Herald, 9 Med.L.Rptr. 1079 (Fla. Cir. Ct. 1983)	Granted	---	Fair Report Privilege	Not cited	Not clear	---	---
Fazekas v. Crain Communications, Inc., 10 Med.L.Rptr. 1513 (S.D. Ind. 1984)	Granted	---	Actual malice (public figure)	Not cited	Favored	The "chilling effect" of a libel suit on First Amendment rights calls for a judicial attitude more favorable to summary judgment then in other cases; no clear and convincing evidence	---
Fernandes v. Fenbruggencate, 549 P.2d 1144, 8 Med.L.Rptr. 2577 (Hi 1982)	Affirmed grant	---	Defamatory meaning	Not cited	Neutral	---	---
Fitzgerald v. Penthouse, 691 F. 2d 666, 8 Med.L.Rptr. 2341 (4th Cir. 1982)	Reversed grant	Substantial issue of material fact	Actual malice (public figure)	Not cited	Neutral	Although actual malice is a difficult standard, plaintiff has produced sufficient factual basis to prove it	Reversed & Remanded
Fleury v. Harper & Row, 698 F.2d 1022, 9 Med.L.Rptr. 1200 (9th Cir. 1983)	Affirmed grant	---	Statute of limitations	Not cited	Neutral	---	---
FoodScience Corporation v. McGraw-Hill, Inc., 10 Med.L.Rptr. 2127 (D. Vt. 1984)	Granted	---	Actual malice (public figure)	Not cited	---	Record fails to establish clear and convincing evidence of actual malice; no need for further discovery	---

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Freeze Right v. New York City, 10 Med.L.Rptr. 2032 (N.Y. Sup. Ct. 1984)	Reversed denial	---	Fair Report Privilege	Not cited	Neutral	Plaintiffs have shown no evidence of gross irresponsibility	---
Fremont Energy Corp. v. Seattle Post-Intelligencer, 9 Med.L.Rptr. 1569 (W.D. Wash. 1982)	Granted in part	(Defendant's do not seek S.J. for private individuals)	Actual malice (public figure)	Not cited	Neutral	Defendants seek summary judgment only as to public figure plaintiffs; no evidence that comes near to showing actual malice with convincing clarity	---
Gaeta v. New York News, 10 Med.L.Rptr. 1966 (N.Y. 1984), rev'g, 9 Med.L.Rptr. 2081	Reversed denial	---	Gross irresponsibility	Cited in the lower court opinion - 9 Med.L.Rptr. at 2085	Neutral	Although libel suits involving defendant's state of mind may be inappropriate for summary judgment, it is available when there is no issue of fact	Complaint dismissed
Geiger v. Dell Publishing, 560 F. Supp. 12, 9 Med.L.Rptr. 2420 (5th Cir. 1983)	Affirmed grant	---	Gross irresponsibility	Not cited	Not clear	To require book publisher to check every potentially defamatory reference would chill free flow of ideas First Amendment seeks to protect	---
Gintert v. Howard Publications, 565 F. Supp. 8299, 9 Med.L.Rptr. 1793 (N.D. Ind. 1983)	Granted	---	Group libel	Not cited	Neutral	Group too large to sustain action	---
Grebner v. Runyon, 10 Med.L.Rptr. 1719 (Mich. Ct. App. 1984)	Reversed grant	Genuine issue of fact	Actual malice (public official)	Not cited	Neutral	---	Reversed & Remanded
Green v. Northern Publishing, 8 Med.L.Rptr. 2515 (Alaska 1982)	Reversed grant	Material issue of fact	Actual malice (public official)	Not cited	Neutral	Reasonable person could conclude that defendant acted with actual malice	Reversed & Remanded

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riffin v. entucky Post, 10 ed.L.Rptr. 1159 Ky. Cir. Ct. 1983)	Granted	---	Substantial Truth	Not cited	Neutral	---	---
rund v. Bethlehem lobe, 9 ed.L.Rptr. 1320 Pa. Ct. Com. Pls. 982)	Granted	---	Actual malice (private figure)	Not cited	Neutral	Record reveals that plaintiff cannot prove actual malice; summary judgment favored only in cases involving public figure plaintiffs	---
urda v. Orange ounty, 9 ed.L.Rptr. 1120 Cal. Ct. App. 983)	Reversed denial	Genuine issue of fact	Fair Report Privilege	Not cited	Neutral	---	---
aan v. Board of ublications, 10 ed.L.Rptr. 1671 Co. Dist. Ct. 1984)	Granted	---	Actual malice (private figure)	Not cited	Neutral	Private figure plaintiff involved in matter of public concern	Case dismissed
aas v. Painter, 9 ed.L.Rptr. 1665 Or. Ct. App. 1983)	Affirmed grant	---	Opinion	Not cited	Favored/First Amendment	Statement not reasonably capable of defamatory meaning	---
amilton v. UPI, 9 ed.L.Rptr. 2453 S.D. Iowa 1983)	Granted in part, Denied in part	Genuine issue of fact	Defamatory meaning	Not cited	Neutral	Whether article sufficiently identifies plaintiff is a jury question	---
arris v. Tomczak, 4 F.R.D. 687, 8 ed.L.Rptr. 2145 E.D. Cal. 1982)	Partial summary judgment denied	Genuine issue of fact	Determination of public figure status	Cited at 2148	Neutral	Definition of public figure should be strictly construed; insufficient evidence to resolve public figure issue	---
ashemi v. ampaigner ublications, 10 ed.L.Rptr. 1452 11th Cir. 1984)	Affirmed grant	---	Republication	Not cited	Neutral	---	---

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tjioannou v. ribune Co., 8 d.L.Rptr. 2637 la. Cir. Ct. 982)	Granted	---	Defamatory meaning	Not cited	Not clear	Articles privileged under Fair Reports and Neutral reportage privileges	---
llman v. Carthy, 10 d.L.Rptr. 1789 .Y. Sup. Ct. 984)	Denied	Genuine issue of fact	Actual malice (private figure)	Not cited	Neutral	Court finds that defendant's conduct might have risen to the level of clear convincing evidence of actual malice	Complaint against Cavett dismissed
gan v. Herald mpany, 8 d.L.Rptr. 2567 .Y. 1982)	Affirmed denial	Genuine issues of fact	Gross irresponsibility	Not cited	Neutral	---	---
lloway v. tler, 10 d.L.Rptr. 1068 x. Ct. Civ. App. 983)	Affirmed grant	---	Statute of limitations	Not cited	Neutral	"Publication" is completed on last day of mass distribution	---
lt v. Cox ters., 10 d.L.Rptr. 1695 .D. Ga. 1984)	Granted	---	Actual malice (public figure)	Cited at 1698	Neutral	Although actual malice does not always lend itself to summary judgment, it will be granted if plaintiff does not show actual malice with convincing clarity	---
ish National ucus v. Doherty, Med.L.Rptr. 2299 .C. Super. Ct. 982)	Granted	---	Actual malice (public figure)	Not cited	Neutral	No evidence of constitutional malice with convincing clarity	Complaint dismissed

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Jamason v. Palm Beach Newspapers, 9 Med.L.Rptr. 1965 (Fla. Cir. Ct. 1983)	Granted	---	Actual malice (public official)	Not cited	Favored	To protect free speech, the court must examine the record to see if there is any evidence which would support the claim of actual malice	---
Janklow v. Newsweek, 10 Med.L.Rptr. 1521 (D.S.D. 1984)	Granted	---	Defamatory meaning	Not cited	Favored/First Amendment	---	Action dismissed with prejudice
Johnson v. Lexington Herald-Leader, 9 Med.L.Rptr. 1365 (Ky. Ct. App. 1983)	Affirmed grant	---	Privacy/False light	Not cited	Neutral	Court will not permit what could not be achieved through law of libel and slander to be "backdoored" through tort of invasion of privacy	---
Lal v. CBS, 551 F. Supp. 356, 9 Med.L.Rptr. 1112 (E.D. Pa. 1982)	Denied	Genuine issues of fact	Defamatory meaning	Not cited	Neutral	At trial, directed verdict entered for defendant -- see 10 Med.L.Rptr. 1276	---
Lamelza v. Bally's Park Place, 10 Med.L.Rptr. 1523 (E.D. Pa. 1984)	Granted	---	Defamatory meaning	Not cited	Neutral	---	---
Lane v. Arkansas Valley Publishing Co., 9 Med.L.Rptr. 1726 (Colo. Ct. App. 1983)	Granted	---	Actual malice (public official)	Not cited	Neutral	Plaintiff was unable to show actual malice with convincing clarity; other articles complained of were protected as opinion	---
Lawrence v. A. S. Abell Company, 10 Med.L.Rptr. 2001 (Md. Ct. App. 1984)	Affirmed grant	---	Privacy	Not cited	Not clear	---	---

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Leader v. WSM, Inc., 10 Med.L.Rptr. 1343 (Tenn. Cir. Ct. 1984)	Granted	---	Opinion	Not cited	Neutral	---	---
Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 9 Med.L.Rptr. 1526 (D.D.C. 1983)	Granted	---	Actual malice (public figure)	Not cited	Not clear	Plaintiff cannot meet burden of proving actual malice by clear and convincing proof	---
Lins v. Evening News, 9 Med.L.Rptr. 2381 (Mich. Ct. App. 1983)	Affirmed grant	---	Actual malice (public figure)	Not cited	Favored/First Amendment	No clear and convincing proof to establish actual malice	---
McCabe v. Village Voice, 8 Med.L.Rptr. 2580 (E.D. Pa. 1982)	Granted in part, Denied in part	Genuine issue of fact	Privacy/false light/public disclosure of private facts	Not cited	Not clear	---	---
McNabb v. Oregonian Publishing Co., 10 Med.L.Rptr. 2181 (Or. Ct. App. 1984)	Affirmed grant	---	Actual malice (public official)	Not cited	Neutral	Plaintiff failed to show any material issue of fact from which a reasonable jury could find actual malice by clear and convincing proof	Plaintiff may petition for discretiona review
MacDonald v. Time, Inc., 554 F. Supp. 1053, 9 Med.L.Rptr. 1025 (D.N.J. 1983)	Denied	Libel actions survive death of injured party (N.J. survival statute)	Survivability of libel claim after plaintiff's death	Not cited	Not clear	Plaintiff's failure to provide discovery does not warrant dismissal. See also 7 Med.L.Rptr. 1981	---
Marchiondo v. Brown, 649 P.2d 462, 8 Med.L.Rptr. 2233 (N.M. 1982)	Reversed grant	Summary judgment grant for defendants premature	Actual malice (public figure)	Not cited	Neutral	Insufficient discovery under Herbert v. Lando	Remanded for further discovery
Maule v. NYM Corp., 10 Med.L.Rptr. 1962 (N.Y. Sup. Ct. 1984)	Denied except as to claim for punitive damages	Genuine issue of fact	Actual malice (public figure)	Not cited	Neutral	---	---

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adows v. Taft roadcasting Co., 70 N.Y.S.2d 205) Med.L.Rptr. 363 (N.Y. Sup. t. 1983)	Affirmed denial	Material issue of fact	Actual malice (public figure)	Cited at 1365	Disfavored	Recovery for punitive damages depends on a showing of actual malice; evidence of actual malice must be clear and convincing; actual malice does not readily lend itself to summary judgment	---
deiros v. rtheast Publishing, ic., 8 Med.L.Rptr. 500 (Mass. Super. t. 1982)	Granted	----	Actual malice (public official)	Not cited	Neutral	Summary judgment appropriate in libel cases to avoid "chilling effect"; clear and convincing proof required	---
hau v. Gannet icific, 658 P.2d 12, 9 Med.L.Rptr. 337 (Hi 1983)	Granted to 5 media defendants, denied to U.P.I.	Genuine issue of fact	Actual malice (public official)	Cited at 1341	Neutral	Summary judgment should not be granted if there is a factual dispute about defendant's state of mind; other than plaintiff's higher burden of proof normal summary judgment procedures should be followed	---
ll v. Knight wspapers, Inc., o. 59656 (Mich. t. App., filed 1/27/83)	Affirmed grant	---	Actual malice (plaintiff's public figure status unclear)	Not cited	Neutral	Plaintiff fails to allege any fact sufficient to show actual malice	---
rril v. Monthly troit City *agazine*, 9 d.L.Rptr. 1994 ich. Cir. Ct. 83)	Granted	---	Actual malice (public figure)	Not cited	Not clear	Plaintiff's criminal indictment is a matter of public interest requiring a showing of actual malice; plaintiff fails to show actual malice	---
ller v. arleston zette, 9 d.L.Rptr. 2540 d. Va. Cir. Ct. 83)	Granted	---	Opinion	Not cited	Neutral	Summary judgment is the preferred alternative to protracted and expensive litigation in matters relating to First Amendment	---
llison v. xleon, 10 d.L.Rptr. 2106 d. Ct. Spec. p. 1984)	Affirmed grant	---	Defamatory meaning	Not cited	Not clear	---	---

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olnar v. Star-edger, 10 ed.L.Rptr. 1823 N.J. Super. Ct. 984)	Reversed denial	---	Fair Report Privilege	Not cited	Neutral	---	---
oorhead v. illin, 542 F. upp. 614, 9 ed.L.Rptr. 1134 D.V.I. 1982)	Granted	---	Actual malice (public official)	Not cited	Neutral	---	---
orrissey v. illiam Morrow & o., Inc., No. 2-1213 (4th Cir., iled 7/26/84)	Affirmed grant	---	Statute of Limitations	Not cited	Neutral	Plaintiff had sufficient time to conduct discovery, plaintiff did not establish factual dispute as to date when statute of limitations began to run	---
ulvihill v. orbes, 9 ed.L.Rptr. 1137 D.N.J. 1982)	Granted	---	Defamatory meaning	Not cited	Favored/First Amendment	Summary judgment is particularly appropriate when dealing with defamation claims to prevent a chilling of First Amendment rights	---
ash v. Keene ublishing Corp., 2-C-234 (N.H. uper. Ct., filed /11/84)	Granted	---	Opinion	Not cited	Neutral	Summary judgment is also proper because as a public official, plaintiff must prove actual malice clearly and convincingly and does not do so	---
esbitt v. ultimedia, 9 ed.L.Rptr. 1473 W.D.N.C. 1982)	Granted	---	Actual malice (public figure)	Not cited	Neutral	Showing of actual malice necessary to defeat news article's qualified privilege; plaintiff makes no showing of actual malice	---
ew Testament issionary ellowship v. utton, 9 ed.L.Rptr. 1174 N.Y. Sup. Ct. 982)	Granted in part, Denied in part	Actual malice standard does not apply	Determination of public figure status	Not cited	Not clear	Summary judgment granted to the extent of striking certain paragraphs of plaintiff's complaint	---

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Newton v. Florida Freedom Newspapers, 447 So.2d 906, 10 Med.L.Rptr. 2048 (Fla. Dist. Ct. 1984)	Granted	---	Actual malice	Not cited	Favored	Record fails to show actual malice with convincing clarity; summary judgment should be more liberally granted in actual malice cases	---
Ogren v. Employers Reinsurance Corp., 10 Med.L.Rptr. 2043 (Wisc. Ct. App. 1984)	Affirmed grant in part, reversed grant in part	---	Defamatory meaning	Not cited	Not clear	Article can be construed to refer to some plaintiffs but not to others	---
Pillman v. Evans, 713 F.2d 838, 9 Med.L.Rptr. 1969 (D.D.C. 1983)	Reversed grant	Genuine issue of fact	Opinion	Not cited	Neutral	---	Rehearing en banc granted
Orticke v. Times Picayune, 9 Med.L.Rptr. 1220 (La. Civ. Dist. Ct. 1983)	Granted	---	Actual malice (public official)	Not cited	Favored	To prevent chilling effect on freedom of press, defendant in libel suit is entitled to summary judgment unless plaintiff can prove actual malice; plaintiff fails to meet burden of showing actual malice	---
Ortiz v. Dimarco Valdescastilla, 10 Med.L.Rptr. 2193 (N.Y. Sup. Ct. 1984)	Granted	---	Qualified privilege	Not cited	Neutral	---	---
Palm Beach Newspapers v. Parker, 8 Med.L.Rptr. 2139 (Fla. Dist. Ct. App. 1982)	Denied	Genuine issue of fact	Determination of public figure status	Not cited	Neutral	---	At trial, hung jury
Palmer v. Seminole Producer, Inc., 9 Med.L.Rptr. 2151 (Okla. Ct. App. 1983)	Affirmed grant	---	Truth	Not cited	Neutral	No requirement that discovery be completed before grant of summary judgment; statements privileged as Neutral Reportage	---
Patterson v. Tribune Co., 9 Med.L.Rptr. 2192 (Fla. Cir. Ct. 1983)	Granted	---	Fair report privilege	Not cited	Neutral	Article based on official information	---

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enwell v. Taft Broadcasting Co., 0 Med.L.Rptr. 1550 Ohio Ct. App. 984)	Affirmed grant	---	Privacy/ Newsworthiness	Not cited	Neutral	---	---
ep v. Newsweek, 53 F. Supp. 1000, Med.L.Rptr. 1179 S.D.N.Y. 1983)	Denied	Genuine issue of material fact	Actual malice (public figure)	Not cited	Neutral	Reasonable jury could find actual malice with convincing clarity; summary judgment in libel action is treated the same as in any other action	---
erez v. imes-Picayune, 9 ed.L.Rptr. 2388 La. Dist. Ct. 983)	Granted	---	Actual malice (public official)	Not cited	Favored	Absolutely no proof in record to suggest actual malice much less with convincing clarity; summary judgment in libel suit important to prevent chilling effect on freedom of the press	---
.V. Peters v. night Ridder Co., 0 Med.L.Rptr. 677 (Ohio Ct. pp. 1984)	Affirmed grant	---	Neutral reportage	Not cited	Favored	Summary judgment procedures are especially appropriate in First Amendment area to prevent self-censorship and chilling effect	---
ritsker v. rudnoy, 452 N.E. d 227, 9 ed.L.Rptr. 2029 Mass. 1983)	Reversed denial	---	Opinion	Not cited	Not clear	---	---
edko Corp. v. BS, 10 Med.L.Rptr. 537 (D.C. Pa. 984)	Granted	---	Opinion	Not cited	Neutral	Plaintiff's motion to compel discovery denied as moot	---
eeves v. ABC, 719 .2d 602, 9 ed.L.Rptr. 2289 2nd. Cir. 1983)	Affirmed grant	---	Fair Report Privilege	Not cited	Not clear	---	---
icci v. Venture agazine, Inc., 10 ed.L.Rptr. 1016 D. Mass. 1983)	Granted	---	Fair report privilege	Not cited	Neutral	Statement also protected as opinion	---

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(insley v. Brandt, '00 F.2d 1304, ' Med.L.Rptr. 1225 10th Cir. 1983)	Affirmed grant	---	Truth	Not cited	Neutral	---	---
.itter v. 'atthews, 9 'ed.L.Rptr. 1745 N.Y. Sup. Ct. 983)	Granted	---	Opinion	Not cited	Neutral	3 combined causes; no gross irresponsibility; protected opinion	All 3 cases dismissed
odriguez v. Ishiki, 653 P.2d 145, 9 Med.L.Rptr. 349 (Hi 1982)	Affirmed denial	Genuine issue of material fact	Actual malice (public figure)	Cited at 1354	Neutral	Although plaintiff must prove actual malice with convincing clarity, normal summary judgment procedures should be followed; If defendant's state of mind is in dispute, summary judgment should not be granted	---
ussel v. 'Millen, 10 ed.L.Rptr. 1889 Col. Ct. App. 984)	Affirmed grant	---	Actual malice (public official)	Not cited	Favored	Plaintiffs failed to show that they could produce sufficient evidence to prove actual malice with convincing clarity; summary judgment "particularly appropriate" in actual malice cases	---
ye v. Seattle imes, 10 'ed.L.Rptr. 1483 Wash. Ct. App. 984)	Reversed denial	---	Actual malice (public official and/or public figure)	Not cited	Favored	Plaintiff has not established actual malice with convincing clarity; summary judgment important in First Amendment area to prevent self-censorship	Case dismissed
:barbati v. New ork Post, 10 'ed.L.Rptr. 2190 N.Y. Sup. Ct. 984)	Granted	---	Gross irresponsibility	Not cited	Neutral	---	---
:chiavone v. ortune, 10 'ed.L.Rptr. 1024 D.N.J. 1983)	Granted	---	Statute of limitations	Not cited	Neutral	---	---

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ellers v. klahoma ublishing, 10 ed.L.Rptr. 1795 Okla. 1984))	Affirmed grant	---	Defamatory meaning	Not cited	Neutral	The article was not libelous per se and summary judgment was proper	---
ellars v. tauffer 10 ed.L.Rptr. 2081 Kan. Ct. App. 984), rev'g, 9 ed.L.Rptr. 1398	Reversed grant	Record evidenced negligence	Negligence	Not cited	Not clear	Record devoid of any evidence of actual malice; court finds truth in 2 statements	---
enear v. Daily ournal American, Med.L.Rptr. 2489 Wash. Super. Ct. 982)	Granted	---	Actual malice (public figure)	Not cited	Neutral	Plaintiff has not made prima facie showing of actual malice with convincing clarity; balanced analysis and neutral reporting of "significant public controversy"	---
eymour v. A.S. bell Co., 557 F. upp. 951, 9 ed.L.Rptr. 1098 Md. Dis. Ct. 1983)	Granted	---	Actual malice (public figure)	Not cited	Neutral	No evidence whatsoever of actual malice; summary judgment essential in First Amendment area	---
hockley v. Cox nters., 10 ed.L.Rptr. 1222 N.D. Ga. 1983)	Denied	Genuine issue of fact	Actual malice (public figure)	Not cited	Neutral	Jury could find that statements were made with actual malice, court finds no basis for interlocutory appeal	---
hriver v. palache ublishing Co., 9 ed.L.Rptr. 1053 Fla. Dist. Ct. pp. 1983)	Affirmed grant	---	Opinion	Not cited	Neutral	Plaintiff sustained no actual damages	---

AME OF CASE and citation)	RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	BASIS FOR DENIAL	DISPOSITIVE ISSUE/DEFENSE	HUTCHINSON V. PROXMIRE 443 U.S. 111, 120 n.9 (1979)	SUMMARY JUDGMENT STANDARD EMPLOYED	OTHER MATTERS	CASE STATUS
'igman v. Gove, 10 ed.L.Rptr. 1896 Ga. Ct. App. 1984)	Affirmed grant	---	Actual malice (public figure)	Not cited	Favored	Plaintiff produced no competent evidence contrary to defendants' evidence of lack of actual malice much less clear and convincing proof	---
ipple v. hronicle ublishing Co., 10 ed.L.Rptr. 1690 Cal. Ct. App. 984)	Affirmed grant	---	Privacy	Not cited	Favored/First Amendment	Facts published were not private; article was newsworthy; summary judgment approved procedure in First Amendment cases to prevent chilling effect	---
ivulich v. Howard ublications, 10 ed.L.Rptr. 2013 Ill. App. Ct. 1984)	Affirmed grant	---	Substantial truth	Not cited	Neutral	---	---
pelson v. CBS, 10 ed.L.Rptr. 1608 D.N. Ill. 1984)	Granted	---	Opinion	Not cited	Neutral	---	---
pence v. ashington Post, 8 ed.L.Rptr. 2296 D.C. Super. Ct. 982)	Granted	---	Opinion	Not cited	Not clear	---	Complaint dismissed
pradley v. utton, 9 d.L.Rptr. 1481 la. Cir. Ct. 982)	Granted	---	Privacy	Not cited	Favored/First Amendment	Summary judgment is important in privacy cases to prevent chilling effect on First Amendment rights	Complaint dismissed with prejudice
teer v. Lexleon, 0 Med.L.Rptr. 583 (Md. Ct. pec. App. 1984)	Affirmed grant	---	Fair Report Privilege	Not cited	Not clear	---	---

'AME OF CASE and citation)	RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	BASIS FOR DENIAL	DISPOSITIVE ISSUE/DEFENSE	HUTCHINSON V. PROXMIRE 443 U.S. 111, 120 n.9 (1979)	SUMMARY JUDGMENT STANDARD EMPLOYED	OTHER MATTERS	CASE STATUS
'trada v. Connecticut Newspapers, 10 Med.L.Rptr. 2165 (Conn. 1984), aff'g, Med.L.Rptr. 2603	Affirmed grant	---	Truth/Substantial truth	Not cited	Neutral	---	---
'trutner v. Dispatch Printing Co., 8 Med.L.Rptr. 2345 (Ohio Ct. App. 1982)	Affirmed grant	---	Privacy	Not cited	Neutral	Evidence does not give rise to false light claim; information is of "legitimate public concern"	---
'rapp v. Southeastern Newspapers, 10 Med.L.Rptr. 1985 (S.D. Ga. 1984)	Granted	---	Actual malice (public official)	Cited at 1990	Neutral	Post-Hutchinson cases reaffirm applicability of summary judgment to libel cases; jury could not find actual malice with convincing clarity; no further discovery needed	---
'riangle Publications v. Chumley, 10 Med.L.Rptr. 2076 (Ga. 1984)	Affirmed grant in part and denial in part	Genuine issue of fact	Negligence	Not cited	---	Summary judgment denied on libel claim; granted on privacy issue	---
'ucci v. Gannett, 464 A.2d 161, 9 Med.L.Rptr. 2345 (Me. 1983)	Affirmed grant	---	Actual malice (public official)	Not cited	Neutral	Insufficient evidence to find or infer actual malice with convincing clarity	---
'alentine v. CBS, 698 F.2d 430, 9 Med.L.Rptr. 1249 (11th Cir. 1983)	Affirmed grant	---	Substantial truth	Not cited	Neutral	---	---
'alker v. Southeastern Newspapers, 9 Med.L.Rptr. 1516 (Richmond County Court 1982)	Granted	---	Opinion	Not cited	Neutral	Even if statements could be construed as fact plaintiff fails to establish evidence of actual malice	Action dismissed

NAME OF CASE (and citation)	RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	BASIS FOR DENIAL	DISPOSITIVE ISSUE/DEFENSE	HUTCHINSON V. PROXMIRE 443 U.S. 111, 120 n.9 (1979)	SUMMARY JUDGMENT STANDARD EMPLOYED	OTHER MATTERS	CASE STATUS
Walters v. Linhof, 559 F. Supp. 1231, 9 Med.L.Rptr. 1477 (D. Colo. 1983)	Granted	---	Defamatory meaning	Not cited	Favored/First Amendment	Communications absolutely privileged; constructive consent; summary judgment frequently granted to avoid chilling effect	---
Whitfield v. Southeastern Newspapers Corp., 10 Med.L.Rptr. 1771 (Ga. Super. Ct. 1984)	Granted	---	Actual malice (public official)	Not cited	Neutral	Nothing in record to counter by clear and convincing evidence defendant's showing of absence of actual malice	Complaint dismissed
Williams v. New York Times, 10 Med.L.Rptr. 1495 (Fla. Cir. Ct. 1984)	Granted	---	Fair Report Privilege	Not cited	Neutral	Accurate report of public trial	Dismissed with prejudice
Williams v. KCAU-TV, 555 F. Supp. 198, 9 Med.L.Rptr. 1073 (E.D. Pa. 1983)	Granted	---	Fair report privilege	Not cited	Neutral	---	---
Wynberg v. National Enquirer, 8 Med.L.Rptr. 2398 (C.D. Cal. 1982)	Granted	---	Actual malice (public figure)	Not cited	Neutral	Record "totally lacks showing that competent evidence exists" as to actual malice; "libel proof plaintiff" much less clear and convincing proof; substantially true statements	---

SUPREME COURT REPORT: NEW TERM BEGINS WITH NO MEDIA LIBEL CASES ON THE DOCKET; BUT TWO OTHER IMPORTANT CASES TO BE DECIDED

Last year's 1983-84 Term proved to be perhaps the most significant one in at least five years for media libel law, with decisions in four key cases -- Bose v. Consumers Union, 10 Med.L.Rptr. 1625; Keeton v. Hustler Magazine, 10 Med.L.Rptr. 1405; Calder v. Jones, 10 Med.L.Rptr. 1401; and Rhinehart v. Seattle Times, 10 Med.L.Rptr. 1705. See LDRC Bulletin No. 10 at 16.

This new Term begins with no significant media libel cases on the Supreme Court's docket. However, the Court has two other important libel cases under consideration -- Dun & Bradstreet v. Greenmoss and Smith v. McDonald. While these are both technically "non-media" actions arguably of less significance to the media than the cases decided last Term, they are nonetheless of indirect significance and they will in all likelihood result in dicta, if not holdings, of importance to media interests. They may also provide additional indications of the attitudes and alignments of the Justices on libel issues that could be of significance in future media cases.

In Dun & Bradstreet v. Greenmoss, 143 Vt.2d. 66, cert. granted, 53 U.S.L.W. 3369 (1983), the Supreme Court seemed to have taken the case to decide one of the issues left open in Gertz -- i.e., the extent to which the First Amendment's limitations on the award of presumed and punitive damages in libel actions, as defined in Gertz v. Robert Welch, Inc., apply to "non-media" defendants. The Vermont Supreme Court had held, contrary to the weight of authority on this issue in the lower courts, that Dun & Bradstreet was a non-media defendant and was not subject to the Gertz limitations on damage awards. The case was argued during the 1983-84 Term, but was not decided. It seems that the Justices might have been troubled by the so-called "media"/"non-media" dichotomy that has grown up around the law of constitutional libel since Sullivan and Gertz. As a result, on the last day of the 1983 Term, the Court "restored" the Greenmoss case to its calendar for reargument. In so doing, the Court requested the parties to brief an additional issue which it framed as follows:

> "Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages whould apply where the speech is of a commercial or economic nature." (emphasis added)

The Greenmoss case was reargued on October 3, 1984 and the matter is still sub judice as of the date of this Bulletin. Because of the potential significance of the case, both as to the issue of the limits on damages in media and non-media cases, and also as to the proposed new dichotomy between speech of an economic or commercial nature and other kinds of speech suggested in the Court's reargument order, we summarize below certain arguments from the briefs of the parties and amici.

In its Supplemental Brief on Reargument, Petitioner Dun & Bradstreet (represented by Gordon Lee Garrett, Jr. of Hansell & Post in Atlanta) argued three main points. First that Gertz had already "struck the proper balance," presumably for all parties, "between the interest of free speech and the legitimate state interest in compensating defamation plaintiffs for actual injury." Second, that the Sullivan and Gertz limits on defamation damages "should apply irrespective of the 'non-media' status of the speaker or the 'commercial or economic nature' of his speech." Third, and relatedly, that "there is no sound basis for distinguishing speech of a 'commercial or economic nature' from other speech" for these purposes.

Two of the amici briefs filed in Greenmoss reminded the Supreme Court that Gertz left open the question of whether presumed and punitive damages can constitutionally be awarded in any libel action. See Brief of the the Washington Post, Amicus Curiae, in Support of Reversal, submitted prior to reargument by David E. Kendall of Williams & Connolly, passim; Brief of Dow Jones & Company, Inc. as Amicus Curiae, in Support of Petitioner, submitted on reargument by Robert D. Sack of Patterson, Belknap, Webb & Tyler, at 25. Both amicus briefs urged that presumed and punitive damages do in fact violate the First and Fourteenth Amendments and, in a proper case, the Court should so rule. However, each suggested to the Court that this ultimate issue need not be reached as the damage award in the Greenmoss case can be reversed on the narrower basis that Dun & Bradstreet is "entitled to the minimum protection it has asked for," under Gertz.

In the Dow Jones amicus, on reargument, a compelling case is made against both the media/non-media and the commercial-economic/other speech dichotomies. As to media/non-media, in addition to several arguments against according certain speakers greater coverage than others, Dow Jones emphasized the difficulty and inappropriateness of distinguishing between "media" and "non-media" defendants for these purposes:

> This Court has already rejected the proposition that different categories of speakers receive different degrees of protection under the First Amendment simply because of their status. There is thus no reason or justification to apply a different First Amendment analysis merely because the defendant in a defamation action is considered "media" or "non-media." Moreover, the distinction between "media" and "non-media" in the defamation context is becoming daily more difficult to draw. Companies such as Dow Jones are no longer limited to the traditional print media, but are increasingly involved in electronic forms of communications that are interactive, multi-functional and extraordinarily diverse. The Court should not hinge critical constitutional protections in the libel field, such as the Gertz rule on presumed and punitive damages, on present-day perceptions of what constitutes "the media," for those perceptions -- and any bright line of demarcation between "media" and "non-media" -- will inevitably become obsolete. (Id. at 3)

As to any distinction based upon speech about "commerce" or "economics," Dow Jones reminded the Court of the crucial difference between commercial speech (i.e. advertising which "does no more than propose a commercial transaction") and editorial speech (i.e., "informational rather than propositional" communication). As to the latter, Dow Jones argued:

> There has never been any doubt in this Court that speech about commerce, economics or finance is entitled to full First Amendment protection. *** If the Court were to rule that speech is entitled to a lesser degree of protection simply because of the "commercial or economic nature" of its content, it would open a Pandora's box requiring it to scrutinize the content of the speech involved in all defamation cases to determine the extent to which it was commercial or economic and the resultant level of protection. It was precisely what it viewed as a "case-by-case" approach, initially articulated by a plurality in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), that the Court explicitly rejected in Gertz.

Finally, completing its attack on the Court's commercial speech suggestion, Dow Jones demonstrated why the so-called "commercial speech doctrine" does not apply, in any event, to defamation actions:

> [T]he "commercial speech" decisions of this Court have exclusively involved challenges to governmental regulatory efforts. The classification of speech as "commercial" under the definitions quoted above, and the determination to accord "less protection to commercial speech than to other constitutionally safeguarded forms of expression depended "on the nature both of the expression and of the governmental interests served by its regulation. Punitive damages in defamation suits self-evidently do not involve governmental "regulation" at all, but rather are punishment for speech because of its content. The commercial speech cases are thus inapplicable to any defamation action. More importantly, a comparison of the rationale for the commercial speech decisions with the Court's reasoning in Gertz demonstrates that the "commercial speech" distinction provides no basis for limiting the minimum constitutional protection for defendants in defamation cases so painstakingly articulated in Gertz. Key to the Court's analysis of a

> State's interest cited as "justification[]" for the regulation, is an analysis of the relationship between the State's interests and the regulations involved, id., and an inquiry whether the regulation "is no more extensive than necessary to further the State's interest..." By contrast, the Court's ruling in Gertz with respect to presumed damages was precisely that "the states have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury, 418 U.S at 349, and similarly that "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." Id. at 350. Thus, there is nothing to be weighed. By the very nature of their composition and the function they serve, juries cannot be expected to perform in any given case the careful balancing function that this Court has evolved over a decade in the commercial speech cases. Rather, the balancing of interests in defamation cases as a group was accomplished by the Court in Gertz, when it ruled that with respect to actual damages a private defamation plaintiff may recover on any state law theory based on fault, but that the State's interest in protecting a private defamation plaintiff does not justify presumed or punitive damages -- at least unless the plaintiff succeeds in showing "actual malice." The commercial speech cases focus on regulating acts and recognize no state interest in regulating the content of informational speech. The analysis underlying these cases is inapplicable to a defamation suit and provides no basis for rethinking or revising the balance struck in Gertz.

In another amicus brief submitted on reargument, the Information Industries Association (IIA) (in a brief written by Richard E. Wiley of Wiley & Rein) also presented persuasive data bearing upon the invalidity of the media/non-media and commercial-economic labels in the defamation context. This is particularly true, the brief pointed out, in light of the current and future explosion and diversification of traditional and non-traditional information and distribution technologies:

The information sector uses a great variety of relatively new distribution technologies -- including computer databases, microfilm, data communications, electronic mail, and specialized radio techniques -- as well as traditional means of distribution, such as books, magazines, newspapers, and mail. The consumers served by these services vary from individuals receiving customized research reports, through specialized audiences which desire more efficient access to general information. The "non-media" services have emerged, in part, because the traditional mass media cannot satisfy all of the information needs of our society in an acceptably efficient manner. By their very nature, the mass media must screen out information that is a not relevant to a large, diverse audience (i.e., they often provide information keyed to the "lowest common denominator" of their customers). Moreover, the mass media can only present information in standardized formats, and they must deliver information according to the demands and schedules of mass publication. In contrast, the "non-media" -- by taking advantage of modern technological developments in computers, communications and other areas -- can create information and transmit it to those who need it more economically, more rapidly, more selectively, and more comprehensively than the mass media. For example, some IIA members make available exactly the same information content as a daily newspaper or general magazine, but in computer database form. This enables the database audience to retrieve only those items that are of particular interest, and to obtain them almost instantaneously without extensive research time. Other IIA members supply their customers with customized studies and analyses based on specially tailored research into existing information sources. Still other IIA members give users shared access to vast data files at affordable prices through the use of computer or microprinting technologies.

* * *

Smith v. McDonald, 737 F.2d 427 (4th Cir.), cert. granted, 53 U.S.L.W. 3404 (1984), is the other libel case currently on the Supreme Court's docket for argument and plenary decision. Like Greenmoss, it too does not directly involve a "media" libel action of the type faced by traditional publishers, broadcasters, journalists, and the like. Nonetheless, it does present issues whose resolution or analysis could have at least an indirect bearing upon current defamation law. Thus, in the Smith case an absolute privilege is being sought in defense of a libel action. Similarly, both CBS in the Westmoreland case and Time in the Sharon case have also argued, albeit under different circumstances, that their comments on the official actions of a high public official should be protected by an absolute privilege beyond that created by New York Times v. Sullivan.

In Smith, the defendant wrote a letter to the President, with copies to certain other interested government officials, in which he detailed his objections to Smith's appointment as a United States Attorney. Having failed to secure the appointment, Smith sued for libel. McDonald asserts his continuing belief that the statements in his communications to the President were true, and were certainly not knowingly or recklessly false. However, because as an individual citizen, he does not have libel insurance to pay the costs of his defense, which in a complex and fact-intensive libel trial might be enormous, McDonald has sought to establish an absolute privilege, under the petition clause of the Constitution. The asserted privilege would apply whenever a citizen in good faith requests governmental action from a governmental official with the authority to take such action. McDonald's claim of absolute privilege was rejected by the federal district court and by the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit ruled that the petition clause creates only a conditional privilege, not an absolute one. Its decision was based on an ancient Supreme Court decision that was rendered before the First Amendment was even deemed applicable to the states, and well before the Supreme Court ruled in New York Times v. Sullivan that even alleged libels are at least presumptively entitled to the protection of the First Amendment.

* * *

The Supreme Court's actions, from July 3, 1984, through December 10, 1984, as reflected in 53 United States Law Week, Issue No. 1 (7/3/84), through 53 United States Law Week, Issue No. 23 (12/11/84), are as follows:

I. Certiorari Granted -- Unfavorable Decisions Below (2)

Dun & Bradstreet v. Greenmoss Builders, Inc., 143 Vt. 66, 461 A.2d 414, 9 Med.L.Rptr. 1902 (1983), cert. granted, 52 U.S.L.W. 3937 (1983), reargument granted, 52 U.S.L.W. 3937 (1984). See LDRC Bulletin No. 9 at 14; Bulletin No. 10 at 20. See also pp. 38-43, supra.

McDonald v. Smith, 737 F.2d 427 (4th Cir.), cert. granted, 53 U.S.L.W. 3403 (1984). (Fourth Circuit had rejected defendant's claim for an absolute privilege under the petition clause of the Constitution for allegedly defamatory statements made in a letter to the President commenting on a potential candidate for a federal judicial nomination.). See p 44, supra.

II. Media Defendants -- Unfavorable Decisions Left Standing (4)

Beaufort Gazette v. Deloach, 10 Med.L.Rptr. 1733 (S.C. Sup. Ct.), cert. denied, 53 U.S.L.W. 3342 (11/5/84, No. 84-160). (South Carolina Supreme Court had affirmed a jury verdict against the media defendant, ruling that awards of compensatory and punitive damages were proper in light of evidence that defendant's reporter had a high degree of awareness of the probable falsity of his erroneous report that plaintiff, a private figure, had been arrested and officially charged with assault and battery.)

Evening News Assoc. v. Locricchio, (Mich. Ct. App. 1983), cert. denied, 53 U.S.L.W. 3365 (11/13/84, No. 84-437). (The Michigan Court of Appeals had upheld the trial court's denial of summary dismissal of libel action against newspaper where plaintiff failed to specify remarks deemed libelous within a series of articles containing over 10,000 words, since allegations on entire series of articles may support libel action.)

Piedmont Publishing Co. v. Cochran, 9 Med.L.Rptr. 1918 (N.C. Ct. App. 1983), cert. denied, 53 U.S.L.W. 3236 (10/1/84, No. 83-1459). (The North Carolna Court of Appeals had reversed the grant of a partial summary judgment respecting a claim for punitive damages in a private figure's libel action on the ground that there existed "genuine issues" of fact material to the question of actual malice in the publication of a photograph and accompanying caption.)

Scripps-Howard Broadcasting Co. v. Barber, unpublished, cert. denied, 53 U.S.L.W. 3269 (10/9/84, No. 84-86). (Ohio Court of Appeals for Stark County had reversed the grant of summary judgment in a public official's libel action on the ground that substantial questions of fact existed as to the "truth" of the broadcast.)

III. Media Defendants -- Favorable Decisions Left Standing (4)

Barger v. Playboy, 10 Med.L.Rptr. 1527 (9th Cir.), cert. denied, 53 U.S.L.W. 3239 (10/1/84, No. 84-34). (Ninth Circuit had affirmed the grant of defendant's motion to dismiss on the ground that the allegedly defamatory publication about "Hell's Angels brides" was not of and concerning any individual or group small enough to permit recovery under California law.)

Oak Beach Inn Corp. v. Babylon Beacon, Inc., 10 Med.L.Rptr. 1761 (NY Ct. App. 1984), cert. filed, 53 U.S.L.W. 3326 (10/4/84, No. 84-575). (New York Court of Appeals on a certified question affirmed the trial court and Appellate Division's holding that newspapers, under New York Shield Law, cannot be held in contempt for refusing, in a libel action against it based upon a letter-to-the-editor, to divulge identity of letter's author.)

Renwick v. News Observor, 10 Med.L.Rptr. 1443 (N.C. Sup. Ct.), cert. denied, 53 U.S.L.W. 3239 (10/1/84, No. 84-180). (North Carolina Supreme Court had reinstated the trial court's dismissal of a libel and invasion of privacy complaint on the ground that the newspaper's editorial was not libellous per se because it was, at most, subject to both a defamatory and non-defamatory interpretation and that North Carolina does not recognize a claim for false light invasion of privacy.)

Rochon v. Wolter, 427 So. 2d 495 (La.), cert. denied, 53 U.S.L.W. 3237 (6/13/84, No. 83-2123). (Louisiana Supreme Court had refused to reconsider their previous ruling affirming the grant of summary judgment in favor of the broadcaster defendant on the ground that plaintiff had failed to show that the news reports in question were false, or were broadcast with actual malice.)

IV. Petitions filed But Not Yet Acted Upon (4)

Gannett Co., Inc. v. DeRoburt, 10 Med.L.Rptr. 1898 (9th Cir. 1984), cert. filed, 53 U.S.L.W. 3406 (11/9/84, No. 84-772). (Ninth Circuit had reversed district court's dismissal of Pacific island republic president's libel action against newspaper on grounds that suit was not barred by act of state doctrine.)

Hustler Magazine, Inc, v. Wood, 10 Med.L.Rptr. 2113 (5th Cir. 1984), cert filed, 53 U.S.L.W. 3378 (10/19/84, No. 84-645). (Fifth Circuit had affirmed a trial court judgment for $150,000 in compensatory damages against the magazine, holding that negligence had been established and that such a standard of liability applied, under Texas law, in a false light invasion of privacy action brought by private figure plaintiff seeking actual damages.)

Lauderback v. American Broadcasting Companies, Inc., 10 Med.L.Rptr. 2241 (8th Cir. 1984), cert. filed, 53 U.S.L.W. 3419 (11/14/84, No. 84-787). (Eighth Circuit had reversed district court's denial of summary judgment in favor of broadcast libel defendant on grounds that defendant's broadcast on alleged fraudulent insurance sales presented constitutionally protected statements of opinion, based upon disclosed facts.)

Rye v. Seattle Times Co., 10 Med.L.Rptr. 1483 (Wash. Ct. App. 1984), cert filed, 53 U.S.L.W. 3378 (10/20/84, No. 84-671). (Washington Court of Appeals had affirmed the lower court's grant of summary judgment against public official/public figure libel plaintiff on ground that newspaper reporters' awareness of sources' hostility to plaintiff were insufficient to establish with convincing clarity reporters' reckless disregard.)

V. Non-Media Actions (3)

Chic Magazine, Inc. v. Braun, 10 Med.L.Rptr. 1497 (5th Cir. 1984), cert. denied, 53 U.S.L.W. 3269 (10/9/84, No. 84-250). (Fifth Circuit had upheld the district court's award of punitive damages and determination of plaintiff's private figure status in libel and false light invasion of privacy charge against magazine on grounds of magazine's fraudulently induced consent to publish photo and plaintiff's lack of involvement in public controversy.)

Flemming v. Moore, unpublished, cert. denied, 53 U.S.L.W. 3325 (10/30/84, No. 84-382). (Virginia Circuit Court award of compensatory and punitive damages to plaintiff as public figure for purposes of zoning dispute had apparently been upheld on appeal.)

Gibson v. Boeing Co., (9th Cir. 1984), cert. filed, 53 U.S.L.W. 3437 (11/16/84, No. 84-811).

LIBEL DEFENSE RESOURCE CENTER ANNUAL STEERING COMMITTEE DINNER:

KOCH AND WALLACE DECRY PUBLIC OFFICIAL LIBEL ACTIONS

LRDC's second annual Steering Committee dinner was held on November 7, 1984 at the Waldorf-Astoria Hotel in New York City. The audience was comprised of more than 300 leading media attorneys, media executives and journalists. The theme for the evening was "Libel, Public Officials, Journalism and the Public Interest." The program addressed the policy implications of libel suits by public officials arising out of media coverage of their performance in, and fitness for, office. With the widely publicized trials of General William Westmoreland against CBS and General Ariel Sharon against Time, and the growing number of similar libel actions by other high public officials at the international, national, state and local levels, this issue takes on increasing importance.

Featured speakers at the LDRC dinner were New York City Mayor Edward I. Koch and CBS News Correspondent Mike Wallace. Serving as Master of Ceremonies was E. Gabriel Perle, Corporate Vice President - Law of Time, Incorporated.

Mayor Koch, whose distinguished career in public service extends over two decades, became one of the first elected officials of which LDRC is aware to speak out publicly on the matter of libel suits by public officials against the media. The Mayor, not known as a shrinking violet when it comes to media relations, has never been a libel plaintiff or defendant, however. Mayor Koch questioned the use of libel actions by public officials because such suits threaten to destroy the constitutional "balance," the "healthy tension that must exist between the press and public officals." The Mayor blamed the destruction of this balance on the increased tendency to rely on courts to solve complex problems better addressed in other arenas. According to the Mayor, "a free and open press is

vital to this nation. We must find ways to solve such problems without putting our essential freedoms on trial." The Mayor acknowledged that the press is not always fair, or even accurate. But the answer to these shortcomings, he suggested, is for public officials to "speak out . . . to . . . set the facts straight." "Let us rely," he concluded, "not on libel courts, but on the court of public opinion."

Mike Wallace's distinguished career as a journalist dates back more than three decades. He has won numerous awards for excellence in journalism. While at CBS Mr. Wallace has been a defendant in a number of libel suits, many of them brought by public officials or public figures. None of these actions have resulted in a judgment against him or in a monetary settlement. Wallace is currently a defendant in the Westmoreland suit involving allegations of distortion of enemy troop strength figures during the Vietnam War. Mr. Wallace addressed the impact of libel suits by public officials on investigative journalism. He decried the politicization of libel actions, particularly those brought by public officials with the support of politically-oriented groups. Noting that libel trials are highly inappropriate forums for the debate of political and historical issues, Wallace called for new remedies to deter politically-motivated libel claims, including the requirement that the losing party in such cases pay for the costs incurred by the winning side. On the other hand, Wallace called on the media to continue to pursue accurate and fair but fearless investigative journalism while providing access in their publications or broadcasts to opposing points of view.

E. Gabriel Perle is Corporate Vice President - Law of Time Incorporated. Mr. Perle, who will be retiring from Time this year, was honored at the LDRC dinner for his almost 30 years of service at Time on the forefront of media legal issues. A presentation was made to Mr. Perle by Larry Worrall of Media/Professional Insurance, Inc. During Mr. Perle's tenure, Time has been involved in numerous precedent-setting libel actions. Time is currently defending the suit now pending in a Manhattan federal court by Israeli Minister of

Trade and Industry (and ex-Defense Minister) General Ariel Sharon over Time magazine's coverage of the massacre of civilians during the war in Lebanon.

Because of the importance of their remarks, the texts of both the Koch and Wallace speeches are reproduced below, in slightly edited form.

REMARKS BY MAYOR EDWARD I. KOCH

I'm glad you asked me to be here this evening. I think I'm qualified to appear before such an audience. It just so happens I have a special relationship with the press. We torture each other. Actually, this is a relationship that many public officials enjoy with the media -- if "enjoy" is the right word. Each side has something the other wants. On the one side, it's information that will help to illuminate the workings of government, and provide a good story by deadline time. On the other side, it's publicity -- coverage in the press that can make a program or a policy look good to the public, not to mention the voters. When each side has something the other wants, a balance of power exists, and this balance of power is a fundamental principle of our constitution. The protection of our democracy depends on it. The tension that exists among the branches of government is a lot like the tension usually present in relations between the press and public officials. It is, for the most part, a healthy tension, which helps keep the powers of each side in balance, where they should be. If and when these powers slip out of balance, as they sometimes do, it is imperative to restore the balance at once.

One question we are facing this evening is whether or not the increased use of libel suits is a threat to that balance, to the healthy tension, that must exist between the press and public officials. It is a crucial question, and I'm not sure it's one that can -- or should -- be settled in a court of law.

First, let me give you some background about myself. Despite things you may have heard that were said by and about me, I have never been either a plaintiff, or a defendant, in a libel suit. There have been times when the press has, in my opinion, treated me unfairly. But, on the whole, I have no complaints. For a very simple reason. When I think I've been wronged, I speak out. In other words, I give as good as I get. I've found that the best way to do this is to immediately set the facts straight. I don't know if I hold the record for writing letters to newspapers, but, if I don't, I'm definitely in the top ten. If a reporter or editorial writer makes a factual error -- or gets the facts right but then draws what I believe to be an erroneous conclusion from those facts -- I reach for my pen. And I'm not just talking about the stories that appear in The New York Times or on CBS. Editors of small weekly publications in quiet corners of the City have been surprised to receive detailed letters in which I bring what I consider to be the truth to their attention. It is a rarity for me not to correct a mistaken story if it is of any major moment.

It is my experience that most editors are pretty good about printing rebuttals, but, even if they don't, I still have had my say. My version of events has been made part of the record. Should the matter in dispute come up again, they will have to take my view of the facts into account. We still may not agreee, but at least the balance between the press and government has been restored to a healthy state of tension, which is what it should be. This method of handling disagreements with the press works well for me. As I said, I have never resorted to libel suits. I hope I never will.

Clearly, however, a different philosophy is taking hold in our society. The explosion of libel suits involving public officials is definitely cause for concern. The LDRC deserves credit for tackling tough issues surrounding the question of libel law and its proper application in a democracy. In a wider sense, I believe the increase in libel suits is part of the general increases in litigation everywhere. People seem to

be suing each other more, and enjoying it more, too. It's not by accident that "The People's Court" is a hit on TV and Judge Wapner is now better known than Judge Crater. Courtroom confrontations make good drama. They always have. It remains to be seen, however, where this trend is leading us. Some observers blame the explosion of litigation on the explosion of lawyers. It has been suggested that some day all Americans will be lawyers and we'll earn our living suing each other. Other people think the problem stems from a basic change in the nature of our society. Where once we were inclined to work things out among ourselves, we now seem angrier, and isolated, and only able to get together in court.

These ideas may have merit, but I would like to suggest another possible reason for the growth in litigation. It is a disturbing fact that the public, along with the legislative and executive branches of government, have increasingly sought to abandon their responsibilities and have dumped important and complex decisions on the courts. Desegregation is a good example. ***** In other areas, such as environmental protection, welfare, criminal justice and employment, the judiciary has also stepped into a vacuum left by legislators. These lawsuits all have two common threads. First, they encourage the courts to become closely involved in the day to day operations of government administration, often over a period of many years. Second, they are caused either by a lack of legislative guidance or by Congressional advice as to the goals -- but not the means -- of social policy.

It seems clear to me that the increasing influence of the judiciary on our society is making itself felt in areas other than the ones I have mentioned -- areas such as libel. I am suggesting that because the courts have been used to solve problems that other branches of government refused to touch, the balance of powers may be getting unbalanced. If this is true, the public and elected officials have only themselves to blame. We have been giving the courts far too many problems to solve. It is not surprising that we now find ourselves worried

about the involvement of the courts in such complicated and highly ambiguous areas as libel -- an area which reflects directly upon First Amendment questions and the foundation of our freedoms.

Essentially, it comes down to this. The real test of a good fire department is not how fast they put out a fire. It is how many fires they are called upon to fight. The fewer the better. The same should be true for our legal system. Its test should not be based only on the way in which cases are handled by the courts. If too many cases are reaching our courts, it is a sign that something's wrong. This is especially true of accusations of libel against the press. A free and open press is vital to this nation. We must find ways to solve such problems without putting our essential freedoms on trial. Not all issues can be resolved by a judge and jury. Whenever we turn to the courts for resolution of private, executive or legislative issues, we only invite the kind of chilling litigation that has brought us here tonight.

However, I don't want to create the impression that the press is always blameless. This has not been my experience. The press and media have a tough job, and usually they do it well. Sometimes, however, they do not. Let me describe some of the ways I keep an eye on the people who are keeping an eye on me. I've already mentioned my penchant for writing letters in which I often set the facts straight. Before anyone can set the facts straight, however, they must know what the facts are. Sometimes, I have noticed that there is a difference between what I say and what a reporter writes in longhand. I speak in shorthand. It's hard to keep up. This is one reason why I always try to have everything I say to reporters recorded on tape by a member of my press office. If questions arise later about who said what, I have the tapes on file. It is a very effective way of keeping the record straight.

Because of my letters to the press, I have heard it said that I'm "thin-skinned". Now I don't claim to have the thickest skin in the world, but I think I'm about average in

this area. In fact, I've noticed that some of the touchiest and thinnest-skinned people I've met are reporters. ***** I accept the rough and tumble of public life. So should reporters. Reporters should be free to state their opinions, and public officials should be free to state theirs. In this way, the balance is preserved. I wouldn't want you to get the idea that relations with the press are bad in City Hall. They aren't. But they are vigorous. I make myself available to reporters, and regularly take questions from audiences at speaking engagements.

But, just as reporters are well advised to keep an eye on public officials, so are public officials well advised to keep an eye on the press. No one is perfect. Reporters do make mistakes. Occasionally, they do worse than that. We all remember the case of a pulitzer prize-winning article in the Washington Post that turned out to be fiction. Here in New York, a reporter for the Daily News was fired for fabricating news events in Northern Ireland. Now I'm sure you'll agree that these are the only two reporters who have ever done such things. I'm also sure you'll agree that such things couldn't possibly happen again. But, just in case -- just to be on the safe side -- perhaps we should ask ourselves whether or not it would be a good idea to have reporters, editors and editorial writers held up to the same standards that we use to judge the performance of public officials.

When compared to standards in the private sector, ethical standards in the public sector are not only strict, they are severe. I was the first Congressman to make his tax returns public. It's a practice I have continued as Mayor. How many members of the press, who spend hours pouring over the tax returns of public officials, would agree to let their taxes be subject to the same scrutiny?

You may say that public officials have special powers and therefore should be under special scrutiny. I would reply that members of the press also have special power -- the power to influence the thinking of millions of people in ways that can

have an instantaneous and far-reaching impact. In New York City, City employees may not accept gifts or favors from persons who do business with the City. Even lunches have to be reported. Consider what would happen, however, if editors and reporters were required to report all free food they receive during the course of a business day. The disclosure reports would be thicker than the Sunday edition. Editorials and news stories, which can have the social impact of a court brief, may well be the opinion of only one person or they may be the result of influence exerted upon that person by someone with a private ax to grind. These are questions that should be considered at greater length, and I hope they will be.

Since I've been Mayor, I've been named as defendant in literally thousands of lawsuits. Thousands! Mike Wallace, all you have is one. Attacking public officials grabs headlines, and headlines sell papers. I don't seek a reduction in the high standards that the public and press impose on public officials, but I do want to say that fairness should apply when we judge the public sector and those who serve in it. Fairness is not easy to achieve, but it should be a constant goal. In this way, we will best be able to muster public support for our news media, and hopefully reduce the disturbing trend towards settling public disputes in courts of law. Let all sides have a fair chance to be heard, and let us rely not on libel courts, but on the court of public opinion.

REMARKS BY CBS NEWS CORRESPONDENT MIKE WALLACE

There's one thing about Ed Koch . . . In fact, there are many things about Ed Koch. But the one I have in mind is that though he has taken some hard shots from the press, a lot of them, he is not the least bit loath to answer in kind. He understands the system between reporters and public figures and he uses it. Eloquently. He knows that one of the system's lively strengths is the vitality, even -- occasionally -- the noise of the political dialogue. And he knows that dialogue,

especially if you're a public official like Ed Koch, belongs not in the libel courts but in the court of public opinion.

Now, I'm no stranger to libel litigation, nor to jury trials for libel. Although I am proud to say, knock wood, that we have never lost one yet on 60 MINUTES, despite the fact that over 100 have been threatened and 50 have actually been filed against us in the 16 years we've been on the air. But, I confess that one of the lesser joys of working on 60 MINUTES is the magnetic attraction we seem to have for those lawyers who seek to work out their hostilities, or sharpen their reputations, or perhaps even fatten their pocketbooks, on Mike, Morley, Harry, Ed . . . and now, heaven forfend . . . Diane. [There followed descriptions of the two non-public figure libel actions that went to trial.] So, in effect, we won both those suits -- but we went through a monumental waste of time and energy. Money too, of course. Plus the emotional drain of any such action causes. Not just to the defendant. I'm sure the same holds true for the plaintiff.

Also, I am no stranger to prolonged libel actions by public figures or public officials. Just this past month, the defendants' summary judgment motion in Herbert v. Lando was decided, dismissing 8 out of 9 of the plaintiff's claims of libel against CBS and me, after over 10 years of litigation. The Anthony Herbert case. As you're aware, that action was instituted in 1974 and had already been to the U.S. Supreme Court on the issue of discovery into the editorial process and the state of mind of the journalist. Read Judge Haight's summary judgment opinion. First of all, it is a literary gem. But it also reveals the care with which Barry Lando undertook to report the facts on which the Herbert broadcast was based. What remains now in that case is one narrow and debatable claim against one line in the broadcast itself -- We at CBS are confident there is no merit in that claim, and that if we do have to go to trial, we'll win. But again, an extraordinary amount of time, effort, and in this case a couple of million dollars have been expended. The report was broadcast 11 years

ago. Does it make sense that it is still in litigation? Nor -- incidentally -- have we ever been able to determine whence have come the plaintiff's funds to launch and sustain the Herbert suit during this past decade and more. And on that subject I'll have more to say later.

But now, of course, what has been described as the most important libel trial of our generation is unfolding here in Federal Court. It may indeed be the most complicated and in some ways the most dramatic because of the cast of characters, who are described by one reporter as some of the "walking wounded" from "the Best and the Brightest," plus personnel from CBS News. As a defendant in the Westmoreland trial, I am necessarily somewhat inhibited in discussing it. But I believe -- when it hears all the facts, both sides -- that the jury will return a favorable verdict both on the evidence and on the state of mind of those of us who put the documentary together. Both issues, needless to say, are of the utmost importance. I remain unpersuaded that the case should have gone to trial, principally because I have difficulty understanding how a high government official can sue (under our Constitution) when the performance of his official duties comes under legitimate scrutiny by the press. But we're beyond that now, of course. Incidentally -- some observers have suggested that as important as the outcome of the trial itself will be the opportunity it will give historians and journalists to get access to documents about the Vietnam War hitherto denied them. I'm all for seeing those documents, too. But I question whether a libel trial is the proper -- the most efficient -- device . . . if you will . . . to pry loose documents from a reluctant government. And by the way, the Westmoreland trial, had it been held in 1974 instead of 1984, would be a different animal, I believe. In the midst of Watergate, with revelations about highly placed shenanigans covering the front pages, chances are the suit wouldn't have been brought in the first place. But these are different times. Different political times. And, of course, there are different perceptions of the press today. There is a considerably different climate in this country today about the motives and the performance of the press.

But the Westmoreland case is only the most viable of a recent flood of public figure, public official libel actions. We seem to be in the vanguard of a new and troublesome type of legal action. The libel trial as a stick with which to beat what is perceived to be an increasingly unpopular press, a stick with which to beat the press for essentially political purposes. What I am alluding to is the recent practice of the funding of libel actions by politically oriented foundations and self-anointed watchdog groups, with a view to stifling comment and criticism of public officials, or to frighten off publishers from taking on certain issues of public controversy. In Westmoreland and others of these cases a new kind of libel plaintiff seems to be emerging. A plaintiff interested not just in the vindication of his personal reputation (which is a perfectly understandable motive). But a plaintiff whose case is taken by a politically motivated group, foundation, non-profit outfit, which funds a libel action, and then uses it as a weapon to try to stifle criticism or dissent, and propund its own parochial views.

Accuracy in media -- for instance -- tax exempt -- has long sought to impose its point of view upon the media in the guise of what they call "fairness." As one man's meat is another man's poison, so AIM's definition of fairness is open to question. Read AIM's literature. It is often scurrilous. Its right wing diatribes demean the word "fairness" -- and the word "accuracy." AIM now solicits and distributes funds to libel plaintiffs, whose suits are filed against those AIM considers "unfair." Incidentally, Bill Moyers says "AIM is to accuracy in media what Cleopatra was to chastity on the Nile." In addition to their previous practice of debating the issues and controversies in the marketplace of opinion, or before regulatory bodies like the Federal Communications Commission, AIM now seeks to fight its ideological battles in the libel courtroom.

And a relatively new organization called CHALLENGE now hopes to raise funds for public officials who want to bring libel suits against the media. Their focus is on current and former CIA officials. CHALLENGE is already supporting at least a couple of libel actions challenging allegations of CIA complicity in the assassination of Orlando Letelier a couple of years ago. How in heaven's name you're going to determine the "truth" or "falsity" of such covert operations in a libel courtroom is beyond me.

Yet another group, the American Legal Foundation, purportedly a public interest entity, has also entered the libel courtroom. Their first foray was in the Dr. Galloway v. CBS 60 MINUTES case. It resulted in a widely publicized defeat, but they'll be back. In fact, I'm told American Legal has recently announced a new project that's about to put them on the libel map in a major way. Their Libel Prosecution Resource Center is already developing a network of attorneys around the country willing to represent plaintiffs in future libel actions. The American Legal Foundation, which formerly spent the lion's share of its resources complaining about media unfairness before the FCC, will soon be devoting more than half its budget to libel litigation.

General Westmoreland's lawsuit is being financed and managed by the Capitol Legal Foundation, another litigious group supported in the main by right wing conservative men and women of wealth -- funded by tax deductible contributions. Money provided by Fluor, Scaife, Richardson, Olin -- a veritable who's who of this country's far right. I surely have no objection to their political activism. But when that activism shifts from open debate to libel litigation I think we all have cause for concern.

Even the Mobil Corporation (in a New York Times op ed ad), has sought financial contributions for the Westmoreland lawsuit. Mobil's views on the press are well known. More than that, in that same op ed piece, Mobil advocates funding for other libel actions by public officials, even suggesting that

the federal government purchase libel insurance for its own executives, which certainly takes Herb Schmertz's P.R. activism across new frontiers.

So one may be forgiven, perhaps, if he asks whether the purpose of a libel action today is a legitimate matter of honor and reputation, or instead a not so subtle device calculated to intimidate both print and broadcast publishers, to curb the editor's and the reporter's appetite for tough investigative undertakings -- in short, to put the fear of crippling, expensive, and chilling legal action in the path of tough reporting of controversial issues.

It has been said that General Westmoreland approached several major law firms to try to get them to undertake his suit. Apparently, each of them -- all of them -- turned him down, for one reason or the other. Then, along came Dan Burt, who runs the Capitol Legal Foundation, and he is surely candid about his motive in undertaking to furnish legal counsel to the General. Burt told USA TODAY: "We are about to see the dismantling of a major news network." Is that what the libel laws were set up to accomplish?

Look. Let me make clear how I feel about libel, slander, defamation, as it involves public officials, public figures. Truth and accuracy must be our standards. And I believe that there should be some means of censure for those among us who distort the truth and defame; there should be some means of legal redress for wrongs committed, no doubt about it. That is a subject keener minds than mind are now considering. Retraction, apology, even financial penalty if malice has been involved. And fairness, too, should be our standard. We in the media shouldn't take advantage of our power to inflict unfair pain and damage on the objects of our scrutiny. But fairness, I think you'll agree, is hardly a test to be imposed in a courtroom. It is not for the courts, but for the court of public opinion -- that Mayor Koch talked about -- to judge

whether the treatment of a public official or a controversial public figure was fair or not. Or whether the legitimate editorial judgment undertaken by the writers, producers, editors, reporters were reasonable or not. That's not for a jury to decide. Not as long as the First Amendment survives in this country.

In Westmoreland, if you'll indulge me for a moment, the issues at trial have been cast in terms of truth and knowledge of falsity, as the constitution requires. And as I said, I personally have no reluctance to defend my reporting against a charge of malice, willful or reckless disregard of TRUTH. But one has to wonder, when a major news organization spends over a year doing an elaborate investigation of important political events, and reaches honest conclusions about those events -- and when it in fact continues to believe firmly in the truth of its reporting after another couple of years of internal review and massively expensive pre-trial discovery -- one has to wonder why it is that a libel trial must go forward. The law says that only knowing falsity will be subject to libel claims by public officials! The Capitol Legal Foundation knows that. And they know that each of us at CBS believes our documentary was true, accurate, faithful to fact.

Is the proper jury to decide whether our documentary was fair, and truthful, and accurate to be 12 individuals picked from the geographic confines of a District Court? Or should it be a national jury composed of the millions of viewers of the broadcast, plus the readers of TV Guide, which quarrelled with our production practices and headlined our broadcast as a smear? Or the viewers of Hodding Carter's "Inside Story," which called our piece a "lynching." Shouldn't they -- the media critics -- give voice to those who challenge our reporting? And isn't that redress? Doesn't that hold CBS up to public scrutiny? Beyond that, CBS offered the General air time to reply. He declined. Should thousands of man hours and millions of dollars be spent, reams of documents exhumed, dozens of witnesses by deposed? And no matter who wins before that jury of 12 in the courtroom -- CBS or Westmoreland -- can anyone

doubt the case will go on through the appeal process, for years ahead? And that the issues will continue to be debated?

Can the media (or some of us who work in the field) be fairly accused of excesses? Shortcomings? Unfairness? I've not the slightest doubt we can. But Judge Haight's recent opinion in the Herbert case is worth listening to:

> "In a free country," -- he writes -- "a free press guarantees our freedom by casting a cold and critical eye upon the performance and pretentions of those who aspire to or hold public office, or for other purposes seek public attention. The First Amdendment ensures full, vigorous, uninhibited, fearless -- in short, free discussion be it praise or criticism of public figures, without the intimidating risk of libel suits."

Can a small newspaper afford to engage in full vigorous and uninhibited discussion of the activities of local public officials if it can mean hundreds of thousands of dollars in potential defense costs in libel actions? Can -- will -- even big publishers continue to encourage their editorial employees to undertake full throated investigations of offical actions by public figures, with a politically motivated libel suit perhaps lying in wait down the road?

Let's take the Westmoreland case as an example. Now, I know the General's feeling that the press was in some measure responsible for our losing the war in Vietnam. That we reported destructively, inaccurately. Most of the reporters and editors and analysts from those days think the General was wrong. But that's for public debate, not for a jury to decide. (And there's a personal irony in all this. The General used to think I was a pretty good reporter. I knew him slightly in Vietnam and I have a letter from him dated March of 1972. He'd happened to see a "60 MINUTES" piece I did on some wounded Vietnam veterans, and he congratulated me on my reporting of that piece. "I have never seen better," he wrote.) I'm sure it was difficult for General

Westmoreland to sit and watch our documentary. To see officers from his own command, MACV, come forward and say the "books were cooked" in Vietnam, that the truth was not told about enemy strength. I'm sure it hurt. It hurt, too, when General Westmoreland held a news conference in Washington and called into question my integrity and that of my colleagues who produced the documentary. When he and a group of his supporters suggested that we had willfully distorted, fabricated, made up a story about the intelligence war in Vietnam. But that's what public debate is all about.

The General says he'll give any money he might win to charity. That he's suing not for himself but for the honor of the men who served with him in Vietnam. Well it occurs to me that the honor . . . and the memory of those men is better served by frank, free and full, even painful public discussion of what went on out there than in the filling of politically funded libel suits. The fact is that if a public official or public figure feels he has been unfairly attacked or accused, he'll have little trouble getting the attention of the media, indeed, General Westmoreland himself has proved that the media were responsive to his denials and assertions regarding our Viet Nam documentary. His news conferences were thoroughly reported. He and his supporters have appeared on radio and television, they had been widely quoted in print, long before he brought a libel suit.

What to do about all this? As I've said, keener minds than mine are grappling with that puzzle. I've only one suggestion. If the Capital Legal Foundation -- or any other such group -- feels it wants to fund a libel suit, okay. But if it loses . . . and the cost to the defendant has been millions of dollars, should we not perhaps take a page from the British book, the West German book? And put it in our libel law, too, that the loser of the libel suit picks up the winners' costs? It seems a tough solution. But perhaps it's the best way. Perhaps it will give pause to those who file libel suits as nuisances, or to score political points. Everyone here knows that libel litigation has exploded in recent years. And we all know the statistics. That juries these days are deciding heavily against defendants. And that judges are reversing heavily in the defendants' favor.

Time, money, credibility, reputations are being wasted along the way. We in the press have got to do our jobs responsibly. But you in your profession have a responsibility, too. Both of us must try to make our libel laws more sensible. And in our pursuit of that, some of us in journalism and some of you in law -- it seems to me -- should try to come up with a way for public officials, public figures who feel they have been defamed to respond to criticism that they feel is unfair or inaccurate. That is not so much a problem for the print media. They have space on their op ed pages for the kind of thing I have in mind. We in television have not yet made a sufficient effort to come up with a workable format to permit responses to our broadcasts. And we postpone the tabling of such a plan at our own peril. We cannot complain about libel trials and preach the necessity of free and full discussion of issues of public controversy, and then fail to make our facilities available for that discussion.

Of course we need the kind of investigative documentaries that will help inform and illuminate. And they should be thorough -- fair -- fearless, and truthful. But dissenters should have a chance to register their disagreement. The Capitol Legal Foundation people will tell you that's what they have in mind. Well, let's give them a chance to prove their mouth is where their money is. In that way, perhaps, the wave of libel trials will diminish, and the public dialogue, the public understanding will be better served.